APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 18, 2000 Decided June 16, 2000

No. 99-1198

CONTEMPORARY MEDIA, INC., ET AL.,
APPELLANTS

v.

FEDERAL COMMUNICATIONS COMMISSION
APPELLEE

Appeal of an Order of the
Federal Communications Commission

Before: SILBERMAN, HENDERSON, and GARLAND, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* GARLAND.

GARLAND, *Circuit Judge:* Three radio licensees appeal the Federal Communications Commission's (FCC'S) revocation of their licenses and construction permits, as well as its denial of their application for a new station. The FCC took those actions after the licensees' sole owner and president was convicted of sexually abusing children, and after the licensees made misrepresentations to the Commission about the owner's continued involvement in station affairs. In the end, the case is no more difficult than this recitation of the facts suggests, and we therefore affirm the FCC in all respects.

I

The appellant licensees own and operate five radio stations in Missouri and Indiana, hold two construction permits for radio stations in Missouri, and have an application pending for another Missouri station. Michael Rice is the sole shareholder, president, and treasurer of all three licensees and serves on each licensee's board of directors. In November 1990, Rice was arrested for criminal conduct involving sexual acts with a teenager. In April of the following year, he was formally charged with three felony counts of sexual assault on an individual between fourteen and sixteen years of age. The prosecutor subsequently amended the charges to include eight felony counts of sexual assault on individuals between fourteen and sixteen years of age, and four felony counts of forcible sodomy of individuals under fourteen years of age. The sexual abuse involved five children and occurred between December 1985 and October 1990. Two days after the charges were filed, Rice checked himself into a St. Louis hospital for in-patient psychiatric treatment.

In June 1991, two of the licensees filed reports notifying the FCC of the charges against Rice. The reports were filed pursuant to 47 C.F.R. § 165(a), which requires FCC license applicants to maintain "the continuing accuracy and completeness of information furnished" in pending applications. Each report stated that:

> Since Mr. Rice's hospitalization on April 3, 1991, he has had absolutely no managerial, policy, or consultative role in the affairs of the three broadcast corporations in which he has ownership interests and officer positions. In other words, pending a resolution of the referenced criminal charges, Mr. Rice is being completely insulated and excluded from any involvement in the managerial, policy, and day-to-day decisions involving any of the four licensed stations and three construction permits held by the three corporations.

J.A. at 15-16, 120 (citation omitted). In October 1991, Rice was discharged from the hospital. On May 14, 1992, one of the licensees filed another report with the FCC, stating:

> There has been no change in Mr. Rice's status with [the reporting licensee] or in the status of the proceedings against him..... Mr. Rice is no longer hospitalized, but he continues to be treated by his physicians as an outpatient, and he continues to have no managerial or policy role in the affairs of the three broadcast corporations ... in which he has ownership interests and corporate positions.

Id. at 126-27 (citation omitted).

On August 31, 1994, Rice was convicted of all twelve felony counts against him: four counts of forcible sodomy, six counts of deviate sexual assault in the first degree, and two counts of deviate sexual assault in the second degree. The court sentenced him to a total of eighty-four years in

prison. Because the sentences were set to run concurrently, his maximum term of confinement amounted to eight years. Rice began his incarceration on September 30, 1994, and is currently eligible for release.

On October 10, 1995, the FCC ordered an evidentiary hearing at which the licensees were directed to show cause why their licenses and construction permits should not be revoked and their pending application denied. The central issues at the hearing were: (1) the effect of Rice's felony convictions on the basic character qualifications of the licensees, and (2) whether the licensees had misrepresented to the FCC that, subsequent to his arrest, Rice had been excluded from the management and operation of the stations. After the hearing, the Administrative Law Judge (ALJ) concluded that revocation of the licensees' authorizations was appropriate due to the egregious nature of Rice's misconduct and to the misrepresentations made by the licensees in their reports to the Commission. The FCC affirmed.

II

The licensees' appeal raises a number of challenges, which we address in turn. First, they challenge the legality of the character policy upon which the FCC's decision was based. We must sustain that policy unless we find it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A); *see ACLU v. FCC,* 823 F.2d 1554, 1574 (D.C. Cir. 1987).[1]

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[1] The licensees rely on our decision in *Bechtel v. FCC,* 10 F.3d 875 (D.C. Cir. 1993), which stated that agencies must be prepared to defend the underlying validity of policy statements because those statements "are exempt from the Administrative Procedure Act's notice-and-

(Continued...)

Section 308(b) of the Federal Communications Act provides that "[a]ll applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, ... and other qualifications of the applicant to operate station" 47 U.S.C. § 308(b). For many years, the FCC had no express policy concerning the character qualifications of its applicants; the Commission considered a wide range of factors in evaluating character, and as a consequence its evaluations sometimes yielded inconsistent results. *See Policy Regarding Character Qualifications in Broadcast Licensing,* 87 F.C.C. 2d 836-37 (1981)(notice of inquiry). The Commission responded to this problem in 1986 with the adoption of a comprehensive character policy statement. *See Policy Regarding Character Qualifications in Broadcast Licensing,* 102 F.C.C.2d 1179 (1986) [hereinafter *1986 Character Policy Statement*]. The statement announced that the FCC's character analysis would focus on "misconduct which violates the Communications Act or a Commission rule or policy, and . . .certain specified non-FCC misconduct which demonstrate[s] the proclivity of an applicant to deal truthfully with the Commission and to comply with [its] rules and policies." *Id.* at 1190-91. The relevant non-FCC misconduct was limited to adjudicated cases involving: fraudulent representations to government agencies, criminal false statements or dishonesty, and broadcast-related violations of antitrust laws or other laws concerning competition. *See id.* at 1195-1203. The FCC noted, however, that "there may be circumstances in which an applicant has engaged in nonbroadcast

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(...Continued)

comment requirements and hence may take effect without the rigors-and presumed advantages-of that process." *Id.* at 878 (citation omitted). Because we conclude that the FCC did adequately justify its policies in the decision under review, *Bechtel* does not affect our analysis.

misconduct so egregious as to shock the conscience and evoke almost universal disapprobation." *Id.* at 1205 n.60. "Such misconduct," the Commission stated, "might, of its own nature, constitute *prima facie* evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee, and might be a matter of Commission concern even prior to adjudication by another body."" *Id.*[2] The 1986 statement also listed mitigating factors that the Commission would consider in evaluating specific acts of misconduct. *See id.* at 1227-28.

In 1990, the FCC determined that its 1986 policy had taken "an overly narrow view of the range of misconduct that should be relevant in licensing decisions." *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 F.C.C.R. 3252, 3252 (1990) [hereinafter *1990 Character Policy Statement*]. It therefore amended that policy with a new statement, which explained:

> [U]pon further reflection, we believe a propensity to comply with the law generally is relevant to the Commission's public interest analysis, and that an applicant's or licensee's willingness to violate other laws, and, in particular, to commit felonies, also bears on our confidence that an applicant or licensee will conform to FCC rules and policies. . . . Thus, evidence of any conviction for misconduct constituting a felony will be relevant to our analysis of an applicant's or licensee's character.

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[2] In addition, the FCC explicitly reserved the option of expanding the range of relevant misconduct "[s]hould [its] future experience indicate that [it had] erred ... in narrowing the range of non-FCC misconduct to be considered for character purposes." *1986 Character Policy Statement*, 102 F.C.C.2d at 1208 n.75.

Id. The FCC further stated that although "not all convictions for serious crimes are equally probative" of propensity to obey the law, it would not "establish a 'hierarchy' of felonies that may arise in individual cases." *Id.* Rather, the Commission would analyze misconduct on a case-by-case basis through the examination of mitigating factors. As in 1986, the Commission stated that for non-FCC conduct it generally would consider only adjudicated cases. However, it "continue[d] to believe that, where an applicant has allegedly engaged in nonbroadcast misconduct 'so egregious as to shock the conscience and evoke almost universal disapprobation,' such conduct 'might be a matter of Commission concern even prior to adjudication by another body.'" *Id.* at 3252 n.5 (quoting *1986 Character Policy Statement,* 102 F.C.C.2d at 1205 n.60).

The licensees' challenge to the legitimacy of the current character policy is threefold. First, they contend that there is "no justification for license revocation based on non-FCC-related criminal misconduct of a licensee's principal, even if such misconduct was 'egregious.'" Br. of Appellants at 17. According to the licensees, such revocation is particularly inappropriate in this case because "there was *no nexus* between Mr. Rice's sexual misconduct and the Licensees' broadcast activities." *Id.* at 16 (emphasis in original).

We disagree, both as a general matter and with regard to the specifics of this case. As to the former, it should be noted that the FCC's policy is not automatically to disqualify a license holder or applicant who commits a felony, but rather to consider the felony as a relevant factor in evaluating propensity to obey the law. *See 1990 Character Policy Statement,* 5F.C.C.R. at 3252. We see nothing irrational in the conclusion that the violation of the criminal laws is relevant to that evaluation and to the issue of character in general. *See generally DiCola v. FDA,* 77 F.3d 504, 507-08 (D.C. Cir. 1996). The FCC relies heavily on the honesty and

probity of its licensees in a regulatory system that is largely self-policing. *See Leflore Broad. Co. v. FCC*, 636 F.2d 454, 461 (D.C. Cir. 1980) ("[E]ffective regulation is premised upon the agency's ability to depend upon the representation made to it by its licensees. . . ."). Under such a regime, a felony conviction--any felony conviction—is certainly a factor to be considered. It may not necessarily be a dispositive factor, and all such convictions may not be equally probative—as the FCC recognizes. *See 1990 character Policy Statement*, 5 F.C.C.R. at 3252. But it is hard to see the argument that a felony conviction is not relevant at all.

In this case, moreover, the argument is particularly weak. It is hardly irrational to conclude that if an individual is unwilling to obey the law with respect to such patently criminal behavior as sexual assault on children, he will be equally unwilling to obey FCC rules that require openness and honesty with the Commission. Indeed, as discussed below, that connection was borne out in this case. Because the policy of considering felonious misconduct was clearly permissible as applied to the licensees, they cannot succeed in their attempt to challenge it on its face. *Cf. Romer v. Evans*, 517 U.S. 620, 643 (1996); *Steffan v. Perry*, 41 F.3d 677, 693 (D.C. Cir. 1994) (en banc).

Second, the licensees argue that the FCC's character policy is arbitrary and capricious because it does not provide any criteria for determining which non-FCC-related misconduct is sufficiently serious to affect a licensee's propensity for reliability in its dealings with the agency. Given the myriad forms of criminal misconduct, the FCC's decision is not unreasonable. The Commission cannot be required to foresee the variety of criminal behavior in which licensees or their owners may partake. And once again, whatever the issue with respect to crimes that might be regarded as being on the boundary of "egregiousness," the

reasonableness of the FCC's decision in the instant case is clear. There is no question but that the crimes at issue here are, as the FCC found, "characterized by moral turpitude" to such an extent that they "fall[ ] in the category of those that 'shock the conscience' and summon almost universal disapproval," *Contemporary Media, Inc.* 13 F.C.C.R. 14,437, 14,444 (1998)—a category that the FCC expressly warned would be the subject of special agency concern. *See 1990 character Policy Statement,* 5 F.C.C.R. at 3252. n.5.

The licensees' third contention is that the FCC's character policy is inconsistent with the precedent of both this circuit and the Commission itself. The licensees cite *Wilkett v. ICC,* in which this court reversed a license revocation based on the sole proprietor's convictions for second-degree murder and conspiracy to distribute a controlled substance. *See* 710 F.2d 861 (D.C. Cir. 1983). That case, however, is readily distinguishable. In *Wilkett*, the court's analysis focused on the fact that the Interstate Commerce Commission had "disregarded its own standards for evaluating [licensee] fitness." *Id.* at 864. The court found that the Commission had failed to "carefully scrutinize[ ] the past violations and consider[ ] mitigating circumstances," as it had in "numerous cases" in the past. *Id.* Here, by contrast, the FCC not only gave careful consideration to Rice's crimes, but it did so pursuant to and in accordance with its published character policy. After scrutinizing the misconduct at issue, the FCC concluded that it was "extremely serious" and involved "numerous acts." *Contemporary Media,* 13 F.C.C.R. at 14,444. Then, as discussed below, the Commission closely evaluated the licensees' claims of mitigation and reasonably rejected them. Moreover, the convictions were not the sole ground for the revocation decision as they were in *Wilkett*; here the licensees were also found to have violated the Commission's candor requirements in connection with the very matter now before us.

The licensees also cite *Kravis Co.*, 11 F.C.C.R. 4740 (1996), in which the FCC renewed radio licenses despite the fact that the company's president and sole shareholder had been charged with possession and exhibition of child pornography. As the Commission explained in its decision below, however, in that case neither a conviction nor a judgment of guilt had been entered against the defendant; instead, the court had placed him on probation pursuant to the state's deferred judgment procedure, which permitted the expungement of the charges after successful completion of the probation period. *See Contemporary Media,* 13 F.C.C.R. at 14,442-43. As noted above, the FCC's character policy states that the Commission generally will consider only instances of adjudicated misconduct. *See 1990 Character Policy Statement,* 5 F.C.C.R. at 3252. Regardless of whether it would be reasonable to erase that line, it is not unreasonable to draw it.[3]

III

Having found no merit to the licensees' challenges to the FCC's character policy itself, we now consider their challenges to the application of that policy in this case. The licensees argue that even if the character policy is legitimate, the Commission erred both in failing to consider numerous mitigating factors that are relevant under the policy, and in

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[3] The licensees seek further support from *Alessandro Broadcasting Co.*, in which the FCC determined that no demerit was warranted for an applicant whose majority shareholder had been convicted of second-degree murder. *See* 99 F.C.C.2d 1 (1984). That decision, however, was rendered before the Commission's 1990 character policy statement gave import to felonies unrelated to dishonesty or broadcast-industry conduct. Moreover, in *Alessandro,* the agency noted that "the crime was an isolated event that occurred in the remote past and the state authorities connected with [the] conviction . . . [had] determined officially that [the shareholder was] rehabilitated and [had] restored his civil rights." *Id.* at 11 n.13. None of those factors is present in this case.

concluding that the licensees misrepresented Rice's continued involvement in station affairs. We address each argument below. Once again, we are mindful that we must sustain the FCC's order unless the challenged action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), and that we must uphold its findings of fact if they are supported by substantial evidence, *see id.* § 706(2)(E); *Damsky v. FCC*, 199 F.3d 527, 533 (D.C. Cir. 2000).

A

The FCC's character policy sets forth a number of mitigating factors to be considered in evaluating misconduct: "the willfulness of the misconduct, the frequency of the misconduct, the currentness of the misconduct, the seriousness of the misconduct, the nature of the participation (if any) of managers or owners, efforts made to remedy the wrong, overall record of compliance with FCC rules and policies, and rehabilitation." *1990 Character Policy Statement*, 5 F.C.C.R. at 3252. Although the FCC credited the licensees' record of regulatory compliance, it rejected all of the other potential bases for mitigation. We agree with the FCC's judgment; indeed, it is hard to regard most of the licensees' contrary arguments as anything but insubstantial.

First, the licensees note that although Rice could have been sentenced to eighty-four years in prison, he was instead sentenced to concurrent terms of "only" eight years. Br. of Appellants at 21. We do not understand the argument. We have no idea, and the licensees have offered none, as to why the state court showed such mercy. Indeed, we have no idea whether it did show mercy—that is, whether the court had sentencing discretion, or whether Rice's crimes were subject to state sentencing laws or guidelines that dictated the sentence he received. Furthermore, we do not regard a sentence of "only" eight years as indicating that Rice's

felonies were somehow "less serious," or that the sentencing court found them so. And finally, we do not understand how the repeated sexual assault of five children could be regarded as anything less than egregious; perhaps wisely, licensees do not suggest what misconduct they would regard as more serious than that described in this record.

Second, the licensee argue that they were entitled to benefit from the "participation of management or owners" mitigation factor. Again, we do not understand the argument. Although it is true that no other "owner" participated in Rice's misconduct, it is only true because there is no other owner: Rice owns all of the equity in each of the licensees. Nor was Rice a minor player in management; he was the president of all of the licensees and sat on the board of directors of each. And while the other corporate managers did not participate in the sexual assaults for which Rice was convicted, they did—as we discuss below—participate in other serious misconduct: namely, intentional misrepresentations to the FCC regarding Rice's continued role.

Third, the licensees appeal to the "rehabilitation" factor, observing that the record contains no evidence of criminal activity subsequent to October 1990, and claiming that Rice's sexual misconduct ceased on that date. The lack of further misconduct after October, however, is hardly coincidental. In November, Rice was arrested on the assault charges. His forbearance from criminal activity during the period in which he awaited trial and was subject to the conditions of pretrial release is hardly indicative of rehabilitation.[4] Moreover, again as discussed below, the evidence shows that he participated in intentional

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[4] It goes without saying that Rice's forbearance while in prison is not indicative of rehabilitation at all.

misrepresentations to the FCC during this supposed rehabilitation period.

Fourth, the licensees point to Rice's "reputation in the community," noting that "four individuals who have known Mr. Rice personally and/or professionally for many years" submitted statements attesting to his good character and reputation. Br. of Appellants at 22. The ALJ properly refused to credit these statements, however, since only one mentioned Rice's felony conviction and none expressed any familiarity with its details. We cannot fault the FCC for concluding that those who vouched for Rice's character while evidencing little if any knowledge of his egregious acts cannot be regarded as credible on the subject.

Finally, the licensees complain that the FCC failed to award mitigation credit for the measurers they took to prevent Rice from engaging in future misconduct, while simultaneously allowing him to "rehabilitate" himself through gainful employment. The licensees emphasize that they adopted resolutions prohibiting Rice from having any "managerial, policy, or consultative role" in their affairs, but that they also permitted him some "limited participation" in accordance with his physician's recommendations. *Id.* at 23-24. The problem with this argument is that the FCC concluded it was factually untrue, finding that Rice participated extensively in station affairs even after the resolutions were passed and that the licensees intentionally misrepresented that participation. As discussed in Part III.B below, we find substantial evidence to support the FCC's findings in this regard. The actions taken by the licensees, therefore, become elements of aggravation rather than mitigation.

In sum, we find no error in the FCC's evaluation of possible mitigating factors. The FCC considered each of the relevant factors set forth in its character policy, and it

reasonably rejected all save one—the licensees' "overall record of compliance with FCC rules and policies." We agree with the Commission's conclusion that "[t]he fact that the Licensees have had a good overall record of FCC rule compliance is not alone sufficient to mitigate the overwhelming negative weight of all the other evidence" in this case. *Contemporary Media,* 13 F.C.C.R. at 14,445.

At oral argument, the licensees conceded that if we were to sustain the FCC's finding of intentional misrepresentation that alone would be sufficient ground for the revocation of their licenses. That concession was plainly correct, as "it is well recognized that the Commission may disqualify an applicant who deliberately makes misrepresentations or lacks candor in dealing with the agency." *Schoenbohm v. FCC,* 204 F.3d 243, 247 (D.C. Cir. 2000); *see also FCC v. WOKO, Inc.* 329 U.S. 223, 225-27 (1946); *Swan Creek Communications, Inc. v. FCC,* 39 F.3d 1217, 1221-24 (D.C. Cir. 1994); *Garden State Broad. Ltd. v. FCC,* 996 F.2d 386, 393-94 (D.C. Cir. 1993). We now turn to an examination of that issue

The ALJ found, and the FCC affirmed, that the licensees "misrepresented and lacked candor in reporting to the Commission that, subsequent to his arrest, Rice was completely excluded from any further involvement in the management and operation of the Licensees' radio stations." *Contemporary Media,* 13 F.C.C.R. at 14,454; *see Contemporary Media, Inc.,* 12 F.C.C.R. 14,254, 14,295 (1997) (initial decision of ALJ). The licensees counter by claiming that they never promised "to completely exclude Mr. Rice from having any involvement in their stations' activities, only to exclude him from having any involvement in the management, policy, and day-to-day *decisions* involving the stations." Br. of Appellants at 25 (emphasis in original). They admit that this distinction is "subtle." *Id.* That is an understatement.

As previously recounted, in June 1991 the licensees reported to the FCC that:

> *Since Mr. Rice's hospitalization on April 3, 1991, he has had absolutely no managerial, policy, or consultative role in the affairs of the three broadcast corporations* in which he has ownership interests and officer positions. In other words, pending a resolution of the referenced criminal charges, Mr. Rice is being completely insulated and excluded from any involvement in the managerial, policy, and day-to-day decisions involving any of the four licensed station and three construction permits held by the three corporations.

J.A. at 15-16, 120 (citation omitted) (emphasis added). There is no dispute that from April until October 1991, the period of his hospitalization, Rice had no involvement with the stations. The licensees concede, however, that several weeks after Rice's release from the hospital, their vice-president permitted him to undertake a number of station-related tasks, which they describe as "occasional and isolated technical projects." Br. of Appellants at 26. Nonetheless, the next report to the FCC, filed on May 14, 1992, stated:

> *There has been no change in Mr. Rice's status with [the reporting licensee] or in the status of the proceedings against him.* . . . Mr. Rice is no longer hospitalized, but he continues to be treated by his physicians as an outpatient, and *he continues to have no managerial or policy role in the affairs of the three broadcast corporations* . . . in which he has ownership interests and corporate positions.

J.A. at 126-27 (citation omitted) emphasis added).

According to the licensees, Rice's conceded involvement in "technical projects" is consistent with this representation because that involvement did not comprise managerial or

decision-making activities but rather "mere opining and musings." Br. of Appellants at 28. The key point that the "hypertechnical" FCC overlooked, they claim, is that the May 1992 report deleted the word "consultative" from the list of roles from which the June 1991 report had said Rice was being excluded. *Id.* at 26. In their eyes, this "critical distinction" between the two reports should have put the Commission on notice that Rice had moved from having no role to having an "opining and musing" role. *Id.* at 27. Indeed, the licensees maintain that this distinction rendered their representations "fully forthcoming" and candid. *Id.* at 26.

By this time, it should be quite clear who is being "hypertechnical" only a side-by-side line comparison of the two filings—conducted with some skepticism of the licensees' candor—would have detected the subtle different in language upon which the licensees now rely. In 1992, however the FCC had no reason to conduct such a forensic comparison of the two representations, particularly in light of the May report's opening declaration that "[t]here has been no change in Mr. Rice's status." That declaration, alone, was plainly false.[5]

Moreover, even if we were to accept that the licensees effectively advised the Commission that Rice was involved in consultation but had no role in management, there is substantial evidence in the record that Rice was involved in management as well. *Cf. WBER, Inc. v. FCC,* 420 F.2d 158, 164 (D.C. Cir. 1969) (holding that questions regarding misrepresentations are factual questions subject to substantial evidence review). As the ALJ stated:

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[5] At oral argument, the licensees argued that their intention was only to indicate that there had been no change in Rice's "ownership or managerial" status. The quoted words, however, do not appear in the declaration, which was completely unqualified.

> Apart from Rice's consultative role, the evidence establishes that, after his release from the hospital in October 1991, Rice was also involved in at least some of the programming matters and personnel decisions of the Licensees, rejected offers to purchase one of the Licensee's construction permits, invited an offer to purchase a station once it went on the air, suggested the trade of specific broadcast properties, and directed the group program director and two of the general managers of the Licensee's stations to perform certain tasks.

Contemporary Media, 12 F.C.C.R. at 14,298.

The licensees contend that there was only "conflicting" evidence on these matters, pointing out that their witnesses disputed much of the testimony upon which the ALJ's conclusions were based. As a consequence, they argue, "[w]itness credibility findings played a predominant role in the ALJ's and the FCC's adverse ruling under the misrepresentation issue." Br. of Appellants at 30. It is true, of course, that when witnesses present conflicting testimony an agency's decision must be based on an evaluation of their credibility. Under our precedents, however, we defer to credibility findings affirmed by the Commission unless they are "patently unsupportable." *E.g., SL Communications, Inc. v. FCC,* 168 F.3d 1354, 1357 (D.C. Cir. 1999). That is not the case here.

Finally, the licensees contend that "intent to deceive" is a necessary element of proving misrepresentation nor lack of candor in FCC proceedings, *see Swan Creek Communications*, 39 F.3d at 1222; *Fox River Broad, Inc.* 93 F.C.C.2d 127, 129 (1983), and that there is no credible record evidence of any intent on their part to mislead or deceive the agency. The evidence discussed above, however, is more than sufficient to support Commission's finding that there was an intent to deceive. As we have

stated before, "the fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity [is] enough to justify a conclusion that there was fraudulent intent." *Leflore Broad. Co.*, 636 F.2d at 462. The licensees concede that they intentionally deleted the word "consultative" from the 1992 filing, and we cannot credit the claim that they did not realize the resulting report would affirmatively mislead the agency as to Rice's resumption of such activities. Moreover, as noted above, there is substantial evidence that the licensees' representations concerning Rice's exclusion from non-consultative (i.e., managerial and policy) activities were themselves false. There is also substantial evidence that the licensees' management knew the representations were false, since management was on the receiving end of Rice's directives.[6] Accordingly, we uphold the FCC's finding of intent to deceive, and with it the Commission's determination that the licensees' misrepresentations warranted revocation.

IV

Finally, we turn to the licensees' contention that the revocation of their licenses and construction permits violates

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[6] To take just a few examples:

> Rice informed [vice president] Cox that he wanted Rhea [the general manager of two of his radio stations] fired, and Cox told Rhea that he was being fired because of Rice's displeasure . . .; Cox told Rhea that Rice wanted [radio announcer] Steel fired after Steel changed [his station's] reporting status in a trade publication; after Rice asked Rhea for information about the cost of the Satellite Music Network, Cox told Rhea that Rice thought [one of the stations] could be programmed for less money by bringing in Rice's own music; and Leatherman [the general manager of another licensee station] responded to Cox after Rice asked him about the need for sound effect CDs.

Contemporary Media, 13 F.C.C.R. at 14,458

the Excessive Fines Clause of the Eighth Amendment.[7] In support of this contention, the licensees cite *Austin v. United States,* which held that the Excessive Fines Clause applies to forfeiture under 21 U.S.C. § 881(a)(4) and (a)(7) of property used to facilitate drug transactions. *See* 509 U.S. 602, 604 (1993). *Austin* has no application here.

In *Austin,* the Court held that the central question under the Excessive Fines Clause is whether the government action at issue is "punishment for some offense." *Id.* at 609-10; *see United States v. Bajakajian,* 524 U.S. 321, 327-28 (1998). In concluding that the forfeitures in that case constitute punishment, the Court focused on the historical understanding of forfeiture as a penal measure, an understanding reflected in prior Supreme Court precedents and in the legislative history of the forfeiture statute. *See Austin,* 509 U.S. at 614-20.

These considerations do not apply to the case at bar. First, the Court's precedents do not reflect an understanding that FCC license revocations or nonrenewals based on character considerations constitute punishment. To the contrary, in *FCC v. WOKO,* the Court rejected just such a claim. *See* 329 U.S. at 228. There, an FCC licensee who had made misrepresentations to the agency contended that the resulting nonrenewal order "inflict[ed] a penalty, that the motive [was] punishment." *Id.* The Court disagreed, stating: "A denial of an application for a license because of the insufficiency or deliberate falsity of information lawfully required to be furnished is not a penal measure." *Id.* Nor have the licensees cited anything in the legislative history of the Federal Communications Act to suggest that Congress had a punitive purpose.

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[7] *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed. . . .").

The FCC revokes a license not to punish a licensee for its conduct, but because that conduct indicates to the Commission that the licensee is no longer qualified to hold it. *See* 47 U.S.C. §§ 303(*l*), 308, 312; *Contemporary Media*, 13 F.C.C.R. at 14,459-60. Revocation comes when the Commission concludes that the licensee can no longer be trusted to deal with it honestly, to follow its regulations, and to operate in the public interest. *See, e.g., Syracuse Peace Council v. FCC*, 867 F.2d 654, 659 n.2 (D.C. Cir. 1989); *Leflore Broad. Co.*, 636 F.2d at 461-62. While the revocation of FCC license privileges "may hurt and . . . . may cause loss," WOKO, 329 U.S. at 228, the does not implicate the Excessive Fines Clause of the Eighth Amendment.

V

For the foregoing reasons, we affirm the decision and order of the Federal Communications Commission.

APPENDIX B

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	MM Docket No. 95-154
	)	
CONTEMPORARY MEDIA, INC.	)	
	)	
Licensee of Stations WBOW(AM), WBFX(AM), and WZZQ(FM), Terre Haute, Indiana	)	
	)	
Order to Show Cause Why the Licenses for Stations WBOW(AM), WBFX(AM), and WZZQ(FM), Terre Haute, Indiana, Should Not be Revoked	)	
	)	
CONTEMPORARY BROADCASTING, INC.	)	
	)	
Licensee of Station KFMZ(FM), Columbia, Missouri, and Permittee of Station KAAM-FM, Huntsville, Missouri (unbuilt)	)	
	)	
Order to Show Cause Why	)	

the Authorizations for Stations KFMZ(FM), Columbia, Missouri and KAAM-FM, Huntsville, Missouri, Should Not be Revoked	)	
LAKE BROADCASTING, INC.	)	File No. BPH-921112MH
Licensee of Station KBMX(FM), Eldon, Missouri, and Permittee of Station KFXE(FM), Cuba, Missouri	)	
Order to Show Cause Why the Authorizations for Stations KBMX(FM), Eldon, Missouri, and KFXE(FM), Cuba, Missouri, Should Not be Revoked	)	
LAKE BROADCASTING, INC.	)	
For a Construction Permit for a New FM Station on Channel 244A at Bourbon, Missouri	)	

Appearances

Howard J. Braun, Jerold L. Jacobs, Shelley Sadowsky and Michael D. Gaffney on behalf of Contemporary Media, Inc., Contemporary Broadcasting, Inc., and Lake Broadcasting, Inc.; and James W. Shook,

Jamila Bess Johnson and Roy W. Boyce on behalf of the Mass Media Bureau.

DECISION

Adopted: June 22, 1998; Released: June 25, 1998

By the Commission:

I. INTRODUCTION

1. this Decision affirms the Initial Decision, 12 FCC Rcd 14254 (ALJ 1997 ("I.D."), of Administrative Law Judge Arthur I. Steinberg (ALJ). The I.D. revoked the licenses and construction permits held by Contemporary Media, Inc. ("CMI"), Contemporary Broadcasting, Inc. ("CBI"), and Lake Broadcasting, Inc. ("Lake") (collectively, "Licensees"), and denied Lake's application for a new station, because of violations of law relating to repeated sexual abuse of children by the stations' sole owner and misrepresentations by the Licensees.

2. By Order to Show Cause and Notice of Apparent Liability ("OSC"), 10 FCC Rcd 13685 (1995), the Commission specified the following issues for hearing:

> (1) To determine the effect of Michael Rice's convictions on the basic qualifications of CMI, CBI, and Lake.
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> (2) To determine whether CMI, CBI, and Lake misrepresented to the Commission that, subsequent to his arrest, Michael Rice has been excluded from the management and operation of the CMI, CBI, and Lake radio stations.

> (3) To determine, pursuant to Section 310(d) of the Communications Act of 1934, as amended, and Section 73.3540 of the Commission's Rules, whether Michael Rice has engaged in the unauthorized transfer of control of CMI, CBI, and Lake.
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> (4) To determine, in light of the evidence adduced under the foregoing issues, whether CMI, CBI, and/or Lake, possess the requisite qualifications to be or remain licensees of their respective radio stations.

The OSC further stated that, if the hearing record did not warrant revocation of the Licensees' authorizations, it would be determined whether an order of forfeiture should be issued pursuant to Section 503(b) of the Act.

3. The I.D. concluded that, although there was no unauthorized transfer of control, Michael Rice's felony convictions and the Licensees' misrepresentations and lack of candor regarding his role at the stations constituted separate and independent grounds for disqualification of the Licensees. In view of this conclusion, the ALJ determined that all of the Licensees' authorizations should be revoked, and that issuance of a forfeiture was therefore unwarranted. The Licensees except to the ALJ's adverse conclusions under the violations of law and misrepresentation issues and to the revocation of its licenses and construction permits; at most, the Licensees argue that a monetary forfeiture under the misrepresentation issue would have been adequate. The Mass Media Bureau supports the I.D. in all respects. The Licensees also seek oral argument. This request is denied because we do not believe such argument would materially assist our resolution of this proceeding.

II. VIOLATIONS OF LAW ISSUE

Background

4. Michael Rice is the sole shareholder of CMI, which is the licensee of Stations WBOW(AM), WZZQ(AM) (formerly WBFX(AM)), and WZZQ(FM), Terre Haute, Indiana. CBI, which is a wholly-owned subsidiary of CMI, is the licensee of Station KFMZ(FM), Columbia, Missouri, and the permittee of Station KAAM-FM, Huntsville, Missouri. Rice also owns all the issued shares of stock in Lake, other than treasury shares; Lake is the license of Station KBMX(FM), Eldon, Missouri, the permittee of unbuilt Station KFXE(AM), Cuba, Missouri, and an applicant for a new FM station in Bourbon, Missouri. Rice is also a member of the Board of Directors and President and Treasurer of all three corporate licensees. The CMI and CBI Boards consist of three persons. The Lake Board consisted of two persons until March 13, 1997, when the second Board member resigned from his position, leaving Rice as the only Board member. I.D., .¶¶ 4-9; Licensees Exh. 1; Order, 97M-49, released April 4, 1997.

5. In November 1990, Rice was arrested in St. Charles County, Missouri for criminal conduct involving sexual acts with a teenager. He was formally charged in an Information issued April 1, 1991, and the Information was subsequently amended on January 6, 1993 and July 5, 1994. In the Second Amended Information, Rice was charged with eight counts of deviate sexual assault of individuals who were between fourteen and sixteen years of age, and four counts of sodomy of individuals who were under fourteen years of age. The alleged activities took place between December 1985 and October 1990. On August 11, 1994, Rice was convicted of four counts of sodomy, six counts of deviate sexual assault in the first degree, and two counts of deviate sexual assault in the second degree, all of which are

felonies. The misconduct for which Rice was convicted involved five children. Rice was sentenced to a total to eighty-four years in prison, but, because the sentences were to run concurrently, his maximum imprisonment was to be eight years. He was incarcerated on September 30, 1994. I.D., ¶¶ 10-11, 13-14; Bureau Exh. 1, Attachments 1-3.

6. In an effort to mitigate the impact of Rice's criminal convictions, the Licensees introduced other evidence, as follows. No other principal of the Licensees, nor any of the Licensees' stations, were involved in Rice's misconduct. I.D., ¶22; Licensees Exh. 1. With the exception of minor forfeitures involving a logging violation and an improperly prepared quarterly issues/programs list involving CMI's WBOW(AM) and WZZQ(FM), the Licensees have no prior record of Commission rule violations. I.D., ¶16; Licensees Exh. 1. In addition, four individuals who knew Rice submitted statements attesting to Rice's character and reputation in the broadcast industry. None of the statements indicated specific familiarity with Rice's felony convictions. I.D., ¶¶ 18-21; Licensees Exh. 5. On April 3, 1991, two days after Rice was formally charged in the criminal case, he was voluntarily hospitalized at the Barnes Hospital, St. Louis, Missouri, for in-patient psychiatric treatment, where he remained for approximately six month. In view of the criminal charges, the respective Boards of Directors of the Licensees adopted resolutions in 1991 providing that Rice would have "no managerial, policy, or consultative role in the affairs" of the stations. I.D., ¶29; Licensees Exh. 1.

7. In the I.D., the ALJ reviewed the Commission's policy on character qualifications in broadcast licensing, as set forth in Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179 (1986), recon. denied, 1 FCC Rcd 421 (1986), appeal dismissed sub nom. NABB v. FCC, No. 86-1179 (D.C. Cir. June 11, 1987) ("1986 Character Policy Statement"), modified, 5 FCC Rcd

3252 (1990) (subsequent history omitted) ("1990 Character Policy Statement"), and concluded that all but one of the factors the Commission deems relevant in determining the weight to be accorded Rice's felony convictions militate against the Licensees. The ALJ found that Rice's misconduct was extremely serious, intentional, repeated, and took place with the time frame the Commission deems relevant to character inquiries. Moreover, the ALJ found that the Licensees' attempt to isolate Rice from any role in stations affairs was not successful because Rice engaged in management-level activities after his release from the hospital in October 1991. The I.D. also concluded that the statements of Rice's character witnesses were not entitled to great weight because they did not address the impact of his criminal convictions on his reputation. Although the Licensees had a good record of compliance with the Commission's rules, the ALJ found that this factor alone did not outweigh the other factors he considered. In addition, the ALJ found that, whereas Rice's criminal activities did not appear to affect the operation of the Licensees' broadcast stations, nevertheless, there was a nexus between Rice's criminal behavior and the Licensees' truthfulness because the record established, under the misrepresentation issue, that the Licensees misrepresented facts to the Commission regarding the extent of Rice's role in managing the stations during the time the criminal proceedings were pending. In the ALJ's view, the Licensees' deception was a direct result of Rice's criminal activities because there would have been no need to submit false reports to the Commission had the misconduct not occurred. The ALJ concluded that the Licensees lacked the paramount character traits of truthfulness and reliability, and, in consequence, were not qualified to retain their authorizations.

8. In their exceptions, the Licensees argue that the Commission's character policy is arbitrary and capricious as applied in this case. Specifically, the Licensees maintain that

the Commission's policy of examining the impact of any felony conviction on an applicant's qualifications is unlawful here because there is no connection between Rice's sexual misconduct and the operation of the broadcast stations, or any relationship between the misconduct and the Licensees' propensity to be truthful and comply with the Commission's rules. In this regard, the Licensees contend that the 1986 Character Policy Statement improperly attributes wrongdoing by a controlling stockholder to the corporate licensee, contrary to precedent requiring that a licensee's qualifications be determined on the basis of its record, not misconduct in its principal's private life. Also, the Licensees challenge the ALJ's conclusion linking Rice's criminal behavior to misrepresentation because the Commission's character policy contemplates that any such connection be related to the nature of the misconduct itself. Even if the Commission's character policy is lawfully applied here, the Licensees argue that the ALJ erroneously evaluated the mitigation evidence, and should have found that the non-seriousness of the crimes, the absence of involvement in Rice's misconduct by other corporate principals, the Licensees' record of FCC compliance, Rice's rehabilitation and his reputation in the broadcast community, and the Licensees' remedial efforts sufficed to overcome the impact of Rice's criminal misconduct.

Discussion

9. The purpose of the Commission's character inquiry is to determine whether the public interest would be served by grant of continued operations of the Licensees before us. See 47 U.S.C. §§308(b), 309(a); 1986 Character Policy Statement, 102 FCC 2d at 1180. In the 1986 Character Policy Statement, we expressed our concern with non-FCC "misconduct which demonstrates the proclivity of an applicant or licensee to deal truthfully with the Commission and to comply with our rules and policies." Id.

at 1190-91. In determining whether a licensee possess the character traits of truthfulness and reliability that we consider relevant to is ability to operate a broadcast station in accordance with our rules and policies, we indicated that specific consideration would be given to adjudicated fraud, criminal misconduct involving false statements or dishonesty, and broadcast-related antitrust violations. Id. at 1195. We also stated that "there maybe circumstances in which an applicant has engaged in nonbroadcast misconduct so egregious as to chock the conscience and evoke almost universal disapprobation. . . . Such misconduct might, of its own nature, constitute prima facie evidence that the applicant lacks the traits of reliability and/or truthfulness necessary to be a licensee . . . ." Id. at 1205 n.60.

10. In the 1990 Character Policy Statement, 5 FCC Rcd at 3252, we significantly expanded our earlier policy regarding the range of non-FCC misconduct we would consider by stating that a licensee's propensity to comply with the law generally is relevant to the Commission's public interest analysis and that evidence of any felony conviction, not just those that involve fraud or untruthfulness, is pertinent to our evaluation of a licensee's character. We stated that a licensee's willingness to commit felonies, which are serious crimes, bears on our confidence that it will conform to our rules and policies. We also recognized that not all convictions for serious crimes are equally probative. Thus, in weighing the impact of a felony conviction on a licensee's requisite propensity to obey the law, we said we would consider traditional mitigating factors, including the willfulness, frequency, currentness, and seriousness of the misconduct, the participation of managers or owners, the licensee's remedial efforts, the overall record of compliance with the FCC rules and policies, and evidence of rehabilitation. Id

11. We do not agree with the Licensees that our character policies are arbitrary and capricious as applied in this case. As explained above, we now consider all felony convictions to be relevant to our determination of whether grant or an application will serve the public interest under 47 U.S.C. § 309(a) because any felony conviction reflects on an applicant's propensity to obey the law generally, a trait which is predictive of its reliability as a licensee and willingness to adhere to our rules and policies. 1990 Character Policy Statement, 5 FCC Rcd at 3252. In addition, even before we broadened the scope of our policy to include all serious crimes, we made plain our view that egregious misconduct would, by its very nature, be prima facie evidence that an applicant lacked the requisite character traits of reliability or truthfulness. 1986 Character Policy Statement, 102 FCC 2d at 1205 n. 60. Thus, contrary to the Licensees' contention, where it is determined that the misconduct in question involves either a felony conviction or egregious wrongdoing, the Commission may lawfully apply it character policies and find a lack of character qualifications without specifically finding a connection between the non-FCC criminal misconduct and the applicant's broadcast activities, and where the criminal behavior is egregious, as it is here, it is also not necessary to find a specific relationship to the applicant's truthfulness. See South Carolina Radio Fellowship, 6 FCC Rcd 4823 (1991) (controlling principal's drug conviction "is itself sufficient basis" for license revocation); Williamsburg County Broadcasting Corp., 5 FCC Rcd 3034, 3035 & n. 4 (1990) (same case) (where criminal misconduct is egregious, we need not find a nexus between behavior and proclivity to be truthful or comply with rules); accord, Richard Richards. 10 FCC Rcd 3950, 3955 (Rev. Bd. 1995). We continue to believe these policies are appropriate and are appropriate specifically as applied in this case. The violations here are extremely serious and do, we believe, give us reason to be concerned about the propensity of the Licensees to comply

with the Communications Act and FCC rules and policies, and to be truthful in their dealings with us.

12. We also disagree with the Licensees that the arbitrariness of the Commission's policy is demonstrated by its inconsistent holdings in other cases involving sexual misconduct. In Hara broadcasting, Inc., 8 FCC Rcd 3177 (Rev. Bd. 1993), cited by the Licensees, the Review Board did not add an issue to explore a felony conviction for sexual misconduct where the arrest and conviction preceded the Commission's expansion of its character policy to cover all felonies and there was no showing whatever with respect to any of the factors the Commission deems relevant in examining an applicant's past behavior. Significantly, as well, Hara did not involve the repeated and long-term sexual abuse of children at issue here. The Licensees also cite The Kravis Co., 11 FCC Rcd 4740 (1996), where the Commission renewed the station licenses without discussion of any character questions. The ALJ in the instant case took official notice (I.D., ¶157 & n. 21) of a 1991 letter from counsel in Kravis advising the Commission that its principal had been charged with sex crimes, but that no conviction or judgment of guilt had been entered against him because he was placed on probation for four years pursuant to the state's deferred judgment procedure. According to the letter, the charges would be expunged upon successful completion of the probation. The Licensees have made no showing that this did not occur or that there was any adjudication or conviction for the Commission to consider.

13. The Licensees also erroneously contend that our policies are arbitrarily applied here because they result in "automatically" attributing Rice's misconduct to them, contrary to The Petroleum v. Nasby Corp., 11 FCC Rcd 3494 (1996), and Wilkett v. ICC, 710 F.2d 861 (D.C. Cir. 1983). The distinction the Licensees seek to draw between the individual and themselves is illusory, however, because Rice

is the sole owner of the Licensees as well as an officer and director of all three corporations, and has never given up these roles. By contrast, in Nasby, the wrongdoer, a minority stockholder, divested his ownership and resigned his corporate positions. Moreover, to make certain that the connection was completely severed, the Commission there remanded the proceeding for a specific determination of whether he could potentially influence the licensee's affairs if the license were renewed.[1] See also Faulkner Radio, Inc., 88 F.C.C. 2d 612, 618 (1981) (renewal conditioned on total exclusion of wrongdoer from station operations). Wilkett involved reversal of an ICC denial of a trucking company's application for expanded authority where the applicant's owner had engaged in criminal activity, including conspiracy to distribute a controlled substance. The court found that there was no record of company misdeeds and that the ICC had disregarded its own standards in past cases for evaluating carrier fitness. In this case, however, as described below, we have carefully weighed each of the factors traditionally considered in evaluating an applicant's

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[1] As the Review Board stated in the same proceeding:

> Were Nasby an individual applicant owned and controlled exclusively by [the wrongdoer], there would be little doubt that this criminal activities catalogued in the record before us would require the denial of its applications.

10 FCC Rcd 6029, 6031 (Rev. Bd. 1995). See also 1986 Character Policy Statement, 102 FCC 2d at 1218 (Commission will treat wrongdoing by corporate managers who are controlling stockholders as though they were sole proprietors or partners). Our policy is not arbitrary, but is intended to treat applicants consistently with respect to character qualifications without regard to the legal form in which they do business. Id. at 1217.

character in order to assess the proper impact of Rice's criminality. Furthermore, we have previously stated that we do not view Wilkett as meaning that a conviction for drug trafficking is irrelevant to a broadcaster's qualifications, particularly since this crime falls into the category of egregious misconduct. See Williamsburg County Broadcasting Corp., 5 FCC Rcd at 3035; see also Commission Clarifies Policies Regarding Licensee Participation in Drug Trafficking (Public Notice), 4 FCC Rcd 7533 (1989) (Commission regards drug trafficking as a matter of the gravest concern and notes that that the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 853a, permits judicial denial of federal benefits to persons convicted of drug offenses). Although each case must be decided on its own facts, it is well established that, where appropriate, the misconduct of one individual may result in the disqualification of the applicant. See FCC v. WOKO, 329 U.S. 223 (1946); Center for Study and Application of Black Development, 11 FCC Rcd 1144 (1996), aff'd by judgment sub nom. Iowa Acorn Broadcasting Corp. v. FCC, No. 96-1066 (D.C. Cir. October 22, 1997).

14. Furthermore, we disagree with the Licensees that the evidence of mitigation in this case overcomes the impact of the felonious criminal activity disclosed in the record. As the ALJ concluded, all but one of the factors we traditionally consider weigh against the Licensees. First and foremost, Rice's misconduct was extremely serous, involving numerous acts of sexual abuse and sexual assault on children ranging from under fourteen to sixteen years of age. Specifically, Rice was convicted of twelve felonies involving the abuse of five children over a five year period. By any standard, these were heinous crimes characterized by moral turpitude. Indeed, we believe they may fairly be described as egregious crimes falling in the category of those that "shock the conscience" and summon almost universal disapproval. As the United States Court of Appeals for the

Second Circuit recently explained in a case involving New York's "Megan's Law":

> The seriousness of the harm that sex offenders' actions cause to society and the perception, supported by some data, that such offenders have a greater probability of recidivism than other offenders have recently combined to prompt the enactment of numerous laws across the country directed specifically toward persons convicted of crimes involving sexual conduct. Studies have shown that sex crimes are widespread . . . and that their impact on both the victim and society as a whole is devastating, see, e.g., [Brief of Amicus Curiae United States] at 5-6 (citing John Briere & Marsha Runtz, Childhood Sexual Abuse: Long-Term Sequelae and Implications for Psychological Assessment, 8 J. Interpersonal violence 312, 324 (Sept. 1993) (noting that molested children are likely to develop severe psychosocial problems) and Alpine Kohn, Shattered Innocence, Psychology Today, Feb. 1987, at 54, 58 (noting that sexually abused boys are more likely than non-abused boys to become sex offenders themselves, and that sexually abused girls are more likely than non-abused girls to have children who are abused)).

Doe v. Pataki, 120 F.3d 1263, 1266 (2nd Cir. 1997).

15. We reject completely the Licensees' claim that the seriousness of the crimes is somehow lessened by the fact that Rice was not sentenced to the maximum term; there is no evidence that the sentencing judge agreed with this

assessment in ordering Rice to serve concurrent sentences or that an eight year sentence is itself an insignificant prison term. In addition to their seriousness, the crimes were willful, repeated over an extended period of time, as recent as five years prior to designation for hearing,[2] and committed by the individual who continues to be the sole owner, president, treasurer, and a member of the Boards of the Licensees. Furthermore, as will be discussed in Detail under the misrepresentation issue, infra, the Licensees did not remedy the situation, as they claimed, by separating Rice from participation in station affairs after the charges were brought against him. In fact, as indicated, Rice has never relinquished any portion of his ownership control or resigned, and he has not been removed from his officer and director positions with the Licensees. Moreover, he was active in personnel and programming matters and performed consultative work for the stations following his hospitalization. The Licensees' evidence of rehabilitation is also insufficient. Three of the character statements submitted on Rice's behalf make no mention of his felony convictions, and the fourth indicates unfamiliarity with the criminal proceeding. The statements address only his competence as a broadcaster. Although the Licensees point out that Rice did not commit further criminal acts after his arrest in November 1990, this does not in itself prove rehabilitation because he has been hospitalized or in prison for approximately half the time since then.[3] The fact that the

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[2] The crimes were well within the ten year limitation applied by the Commission. See 1986 Character Policy Statement, 102 FCC 2d at 1229. Also, Rice's convictions were one year prior to designation. The Commission generally awaits a local court adjudication before it assesses the impact of the criminality on the licensee's character. See 1990 Character Policy Statement, 5 FCC Rcd at 3252.

[3] In this regard, we reject the Licensees' exception to the ALJ's failure to find that Rice has undergone treatment and to admit evidence that Rice

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Licensees have had a good overall record of FCC rule compliance is not alone sufficient to mitigate the overwhelming negative weight of all the other evidence. For the same reason, we disagree with the Licensees that the ALJ erred in disallowing evidence of the stations' good standing and reputation in the community. See Cosmopolitan Broadcasting Corp., 75 FCC 2d 423, 425 n. 3 (1980) (meritorious programming cannot mitigate serious misconduct); KOED, Inc., 3 FCC Rcd at 2827 (Commission will not consider meritorious programming evidence in cases involving intentional wrongdoing or moral turpitude). Contrary to the Licensees' claim, the 1986 Character Policy Statement does not state that misrepresentation is the only area in which past program performance is not considered as mitigating evidence. Id. at 1211 n. 79.

16. In sum, we conclude that our character policies are validly applied to the Licensees, and that the preponderance of record evidence warrants the conclusion that Rice's convictions involving the repeated sexual abuse of children adversely affect their qualifications to remain Commission licensees. As we also concluded with respect to a broadcaster's recent conviction for drug trafficking, we believe that these felony convictions are "egregious crimes against society" that demonstrate a "callous disregard for the

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is required by law to participate in a special rehabilitation program in prison before his release. We agree with the ALJ that this evidence does not establish current rehabilitation. The Licensees' reliance on Alessandro Broadcasting Co., 99 FCC 2d 1, 11 n. 13 (Rev. Bd. 1984) (subsequent history omitted) is inapposite. There, unlike this case, the applicant's crime was an isolated event that was remote in time; the applicant was completely rehabilitated under local law, as evidenced, among other things, by the issuance of a certificate of rehabilitation by the state court; his civil liberties were restored; he had character references from people familiar with his crime; and no predictive nexus was found between his crime and his fitness to be a licensee.

welfare of fellow citizens." See Williamsburg County Broadcasting Corp., 5 FCC Rcd at 3035. As such, the record below destroys our confidence that the Licensees "would well serve the public through exercise of the wide and important discretion that this agency entrusts to licensed broadcasters." See South Carolina Radio Fellowship, 6 FCC Rcd at 4823-24. Rice is the sole owner of the Licensees as well as a corporate officer and director, and the Licensees were unable to make any significant showing of mitigation. We affirm the ALJ's conclusion that the convictions constitute an independent basis for disqualification.[4]

III. MISREPRESENTATION ISSUE

Background

17. This issue concerns whether the Licensees' statements that, subsequent to his arrest, Rice was completely excluded from any involvement in the management and operation of the radio stations were misrepresentations. The issue was based on filings by the Licensees, beginning in 1991, relating to the criminal charges and the Licensees' asserted efforts to insulate Rice from station affairs. Specifically, in a "Statement Pursuant to Section 1.65 of the Commission's Rules" filed June 14,

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[4] Because of the egregious nature of Rice's crimes and the absence of significant mitigation, it is unnecessary to consider whether there is other evidence implicating the Licensees' propensity for truthfulness in order to resolve the violations of law issue adversely to them. See South Carolina Radio Fellowship, 6 FCC Rcd at 4824 (conviction for drug trafficking is "itself sufficient" for revocation; however, evidence of misrepresentation to the court and other misconduct reinforces adverse implication of conviction.).

1991, Lake made the following statement, which CBI repeated in another Section 1.65 filing on June 21, 1991:[5]

> Since Mr. Rice's hospitalization on April 3, 1991, he has had absolutely no managerial, policy, or consultative role in the affairs of the [Licensees] in which he has ownership interests and officer positions. . . . In other words, pending a resolution of the referenced criminal charges, Mr. Rice is being completely insulated and excluded from any involvement in the managerial, policy, and day-to-day decisions involving any of the . . . stations and . . . construction permits held by the [Licensees].

I.D., ¶¶ 32-33; Bureau Exh. 1. The June 14, 1991 statement also made reference to the 1990 Character Policy Statement. Id. Similarly, on August 1, 1991, in connection with an extension of construction permit application for its Huntsville, Missouri station, CBI informed the Commission that "Mr. Rice continues to be hospitalized and to have absolutely no managerial, policy, or consultative role in the affairs of [CBI]." On December 3, 1991, CBI repeated that "Rice continues to have no managerial, policy, or consultative role in the affairs of [the Huntsville station]. . . ." I.D., ¶¶ 34-35; Bureau Exh. 1.

18. On May 14, 1992, in order to "update the Commission on the status of Mr. Rice's criminal proceedings," CBI stated:

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[5] Section 1.65, 47 C.F.R. §1.65, requires that applicants report substantial and significant changes in their applications within thirty days.

> There has been no change in Mr. Rice's status with [CBI] or in the status of the proceedings against him. . . . Mr. Rice is no longer hospitalized, but he continues to be treated by his physician as an outpatient, and he continues to have no managerial or policy role in the affairs of the [Licensees] in which he has ownership interests and corporate positions. . . .

I.D. ¶36; Bureau Exh. 1.

19. On September 30, 1994, the Licensees informed the Commission of Rice's conviction and sentencing. They also stated:

> [CBI/Lake] has previously reported to the Commission that since Mr. Rice's pre-trial hospitalization on April 3, 1991, he has been excluded from involvement in the customary managerial, policy, and day-to-day decisions and operations of [CBI/Lake's] licensed stations and construction permits. . . . [CBI/Lake] wishes to advise the Commission that the exclusion policy will continue throughout Mr. Rice's period of incarceration.

I.D., ¶38; Bureau Exh. 1. The Licensees additionally stated that they were aware the Commission could commence a revocation proceeding against a licensee because of a principal's felony conviction, but requested ninety days to file a brief arguing that a revocation proceeding should not be instituted as a result of Rice's conviction. Id.

20. After formal charges were brought against Rice in early 1991, the Licensees adopted corporate resolutions providing that Rice should have: no managerial, policy, or

consultative role in the affairs" and daily operations of the Licensees' stations. The corporate resolutions also made Janet Cox, a management employee, Chief Executive Officer, and gave her authority to supervise management and day-to-day operation of the stations. Cox also visited the stations to inform the staffs that she had assumed her new position, that Rice was hospitalized, and that he would not be involved in the operation of the stations. She did not tell the staffs of the corporate resolutions or that Rice was to be excluded from station activities after he left the hospital. Following Rice's release from the hospital in October 1991, Cox authorized him to provide consulting and engineering assistance to the Licensees. To reflect this change, she stated that the Licensees modified their reports to the Commission beginning with the May 14, 1992 report by deleting the statement that Rice would have no "consultative" role. She did not know why a direct statement alerting the Commission to the Rice's changed status was not made. The Licensees did not adopt any corporate resolutions authorizing Rice to do consultative work. I.D., ¶¶ 30-31, 43-44, 46, 54.

21. A number of management-level station employees testified as to whether, apart from his consultative role, Rice was also involved in management or operation of the stations following his release from the hospital. Leon Paul Hanks, an employee of KFMZ(FM), Columbia, Missouri, since August 1985, was made program director of the station in February 1989 and group program director of the CMI/CBI (Terre Haute, Indiana and Columbia, Missouri) stations in late 1991 or early 1992, after Rice was released form the hospital. He was terminated on August 5, 1994. Hanks testified that Rice was involved in programming and personnel decisions at the Terre Haute stations. It was Hanks' belief that he was compelled to follow Rice's suggestions or directions about programming and personnel because Rice was the station

owner and his boss. Hanks stated that his primary responsibility as group program director was to keep the formats of KFMZ and WZZQ consistent with what Rice wanted. As group program director, he reported directly to Rice, and regularly updated him on how things were going at the stations. His first assignment from Rice after becoming group program director was to visit WZZQ to go through its music and refine its format. He and Rice discussed the format of WZZQ, problems involving the station's program director, the playlists of KFMZ and WZZQ, and Rice's complaints that the stations were adding too many new songs. Hanks also sent Rice copies of memos Hanks sent to the program directors. I.D., ¶¶ 81, 86-88, 101.

22. Moreover, Hanks testified that Rice was involved in the hiring and firing of station employees, as follows. Hanks stated that, in May or June 1992, Rice directed him to "get rid of" Janice Pratt, an announcer, because her on-air voice was hurting ratings; that Hanks did not feel it was appropriate to tell Pratt she was being fired for that reason; and that Hanks eventually fired her for persistent tardiness. Rice instructed Hanks to "get rid of" Bob Kinneson, another announcer, because he was bringing down Saturday night ratings, but Hanks did not fire Kinneson because the latter resigned to work for another station. Rice complained to Hanks about KFMZ announcer Sean Madden and said he "needed to be let go," but Madden quit to take another job before Hanks could fire him. In August 1993, Rice told Hanks to "get a replacement" for Jeff Davis, who worked evenings at KFMZ, and Hanks carried out the instruction. Rice approved Hanks' suggestion that Ben Jacobs be moved from KFMZ to WZZQ as program director; but after Jacobs made personnel changes at WZZQ which Rice did not approve of, Rice told Hanks that Jacobs "has got to go"; and Jacobs was fired a week or two later, although Hanks did not do it or know who did. Rice discussed with Hanks hiring Mike Steel, an

announcer Rice had spoken to and was impressed with, to be program director of WZZQ in early 1992; Rice offered the job to Steel and said Cox would take care of the hiring; but, after Steel took the job and changed WZZQ's reporting status in a trade publication from Album Oriented Rock to Top 40, Rice became "furious" and told Hanks he wanted Steel "gone immediately." Rice complained to Hanks that Mark Savage, WZZQ program director from April to November 1992, was not maintaining the station's format and decided to get rid of him; and rice, Cox , and Hanks drove to Terre Haute for the express purpose of firing Savage. After Savage was fired, on the drive back to company headquarters, Rice told Cox he was displeased with the job performance of John Rhea, who was then the general manager of WBOW(AM) and WZZQ(FM), and told Cox that Rhea "has got to go." I.D., ¶¶ 89-91, 94, 96, 98-99, 118-120, 123-24, 129.

23. John Rhea, the general manager of WBOW(AM) and WZZQ(FM) from December 30, 1991 until he was terminated on December 16, 1992, also testified that Rice was involved in programming and personnel decisions at the Terre Haute stations. He further stated that Rice, as the owner of the building in which the stations were located, also directed Rhea to show it to prospective tenants and to keep it clean. Rhea assume that Rice, as the stations' owner, "was the boss." Although he understood from Cox that Rice was an "absentee owner," he said Cox did not tell him Rice was to be excluded from management. With respect to programming, Rhea stated that, six weeks after he became general manager, Rice told him he was unhappy with the musical sound of WBOW, and they had a further discussion about the programming of WBOW a month later. Sometime thereafter, Rice asked Rhea to obtain information about the cost of the Satellite Music Network. Rhea did so and sent the information to Cox, who told Rhea that Rice thought the station could be programmed "cheaper" by

bringing in Rice's own music. Rhea also spoke to Rice about the matter. I.D., ¶¶ 103, 107, 111-112.

24. Rhea testified that Rice was also involved in specific hiring and firing decisions, as follows. He stated Rice told him he did not like Chip Ramsey, WBOW's program director; that Rice "wanted him out of there"; that his firing was delayed only because the station had a contract with Indiana State University for Ramsey to broadcast their baseball games; and that Rhea carried out Cox's instruction to fire Ramsey. Rhea hired Steve Holler as an announcer for WBOW; after Rice heard Holler on his first day on the air he told Rhea, "I want him off the radio"; Rice repeated this direction after Rhea protested; and Rhea fired Holler after Cox told him later that day to "[g]et rid of" Holler. Rice told Rhea he was interested in Mike Steel for the program director position at WZZQ; after Steel was hired, Rice became "livid" and "went ballistic" because Steel changed the station's reporting status to Top 40; Cox told Rhea that Rice wanted Steel "out of there immediately"; and Rhea fired Steel at the instruction of Cox and Rice. Rhea stated that Rice and Cox came to Terre Haute to fire Mark Savage; that Rice said to Rhea, "You and Janet go down there and get him out of here"; and that Rhea and Cox then fired Savage. Rhea stated that Cox and Rice returned to Terre Haute in December 1992 and entered Rhea's office; Rice told Rhea he was being fired because of a "change in direction"; and, after Rice left the room, Cox said Rhea's firing was because Rice was displeased with WBOW's financial figures. I.D., ¶¶ 113, 1115-16, 119-120, 126, 130.

25. Cox testified that Rice was not involved in personnel and programming decisions at the stations, did not fire any announcer, program director, or general manager, and does not make policy or managerial decisions concerning day-to-day operations of the stations. Specifically, Cox said it was Hanks, not Rice, who criticized

Sean Madden's performance and wanted him fired; Rice did not tell her that Ben Jacobs should be fired, but she did not know what Rice may have said to anyone else; she decided to hire Mike Steel and did not get Rice's approval to do so, but did not know what Rice said to others at WZZQ about hiring Steel; she did not tell Rhea to fire Steel after the reporting change in the trade publication, and Steel was not fired but resigned; she believed it was either Rhea or Hanks who wanted Mark Savage fired, she alone went to Terre Haute to terminate Savage, and Rice did not direct her to fire Savage; she directed the firing of Chip Ramsey but not because she knew Rice disliked him, and Rice did not tell her to fire Ramsey; it was Rhea who decided to fire Steve Holler, but she did not know if Rice had instructed Rhea to do so; she decided to fire John Rhea, and Rice accompanied her to Terre Haute only to serve as a witness. I.D., ¶¶ 64-66, 68, 95, 100, 114, 117, 121-22, 127-28, 131.

26. Daniel Leatherman, the general manager of KBMX(FM) from September 1990 to March 1996, testified that KBMX personnel did not report to Rice and that Rice was not involved in hiring or firing station employees. I.D., ¶¶ 69, 74. Kenneth Brown, the general manager of WZZQ(AM) (formerly WBFX(AM)), WZZQ(FM), and WBOW(AM) since April 1993, testified that he has received no written or oral communications from Rice concerning the stations' programming, personnel, or operations. I.D., ¶ 78. Similarly, Richard Hauschild, who has been an employee of KFMZ since October 1988, and the general manager and sales manager since June 1991, testified that he has received no correspondence or telephone calls from Rice regarding any aspect of station policy, management, or daily operations since becoming general manager. I.D., ¶¶ 75-76. Hauschild also testified with regard to the firing of specific station employees. He stated that, six months before Janice Pratt was dismissed, he told Hanks she should either correct her problems or be dismissed; that Rice never told him to

get rid of Pratt and Hanks never told him that rice directed him to fire Pratt; but that he was not privy to all the conversations between Rice and Hanks and did not know whether Rice told Hanks to do something. He stated that Hanks fired Bob Kinneson at Hauschild's suggestion; that Hanks did not tell him Rice wanted Kinneson fired; that, so far as he knew, Rice was not involved in Kinneson's firing, but that he did not know if Rice spoke to Hanks about it. He stated that Rice did not make critical comments to him about Sean Madden's performance, and Hanks did not tell him that Rice did not like Madden. He said that Hanks never told him that Rice wanted Jeff Davis fired, but he did not know whether Rice directed Hanks to fire Davis. I.D., ¶¶ 92-93, 95, 97.

27. In addition to the witness testimony summarized above, there is documentary evidence pertinent to the misrepresentation issue. In 1993, Rice faxed six memoranda to Leatherman. The first five dealt with the purchase of an outdoor sign for KBMX, the construction of a storage building, the purchase of a water cooler, the repair of the newsroom telephone, pressure washing the air conditioner condenser units, and construction of a storage room in the studio building. Leatherman took care of the projects that were the subjects of the memos. He stated that the memos did not relate to broadcast operations, but had to do with Rice's interest as owner and landlord of the KBMX facilities in the station's physical plant. I.D., ¶ 70; Bureau Exh. 8. In the sixth memo, Rice asked Leatherman if KBMX needed some sound effects CDs. Leatherman responded to the memo by talking to Cox, who told him they did not need any more music. Leatherman stated that Rice's memo was a follow-up to Rice being told by Dennis Klautzer, then a 20% shareholder in Lake and its corporate secretary, that KBMX needed more sound effects CDs. I.D., ¶ 71; Bureau Exh. 11.

28. The record also contains four letters written by Rice pertaining to the Licensees. The first, written on "Contemporary Media Broadcasting Group" stationary, and dated April 29, 1993, is addressed to Dale A. Palmer, KZZT Radio, Moberly, Missouri. It states:

> Following up on your telephone calls to Janet Cox, we do not want to sell the bare CP for the Huntsville, MO station. . . . We have had three other bona fide inquiries to purchase the station after it is built. . . . However, with the quickly changing industry, we are always interested in business arrangements that are mutually beneficial to all concerned. Soon, we will begin our plans to construct KTDI and locate our main studio location in Moberly, and a second studio at Macon, MO. If you or your associates would be interested in purchasing the station once it is built and on the air, or have some other arrangements in mind, feel free to contact us. If you have any further thoughts or ideas, please let me or Janet know.

I.D., ¶ 132; Bureau Exh. 1, p.24.

29. Similarly, in another letter dated April 29, 1993 on "Contemporary Media Broadcasting Group" stationary, Rice wrote to Jerrell A. Shepherd, KRES Radio, Moberly, Missouri, as follows:

> Following up on your telephone call to me this week, we do not want to sell the CP for the Huntsville, MO station. Contemporary Broadcasting, Inc. does not have the CP for sale, as was told to you by broker/equipment salesman Chris Kreger. . . . We have had

> three other bona fide inquiries to purchase the station after it is built. . . . However, with the quickly changing industry, we are always interested in business arrangements that are mutually beneficial to all concerned. This is why I suggested you consider a swap of the Lebanon, MO property for the Huntsville, MO property. . . . If you have any further thoughts or ideas, please let me know.

I.D., ¶ 133; Bureau Exh. 1, p. 26.

30. In response to a July 20, 1994 letter from Shepherd to Rice stating "I would like to repeat my offer to buy the Huntsville, Missouri CP," Rice wrote to Shepherd on August 3, 1994 on a "Contemporary Media Broadcasting Group" Fax Line Transmittal Sheet as follows:

> I do not recall you ever making an offer to buy KAAM(FM), Huntsville, MO. You did inquire several times, and I wrote you a letter stating that Contemporary Media does not sell CPs, but we would be open to a discussion with you over trading KAAM . . . for KIRK and KJEL, Lebanon that your company has been attempting to "unload" for years. . . . We fully intend to build KAAM, Huntsville, and operate the station, and at this time none of our stations are for sale.

I.D., ¶ 134; Bureau Exh. 1, p. 30.

31. On November 13, 1995, Rice wrote a letter to Cox as follows:

> It seems that we should install a concrete pad as Cloyd suggested to set the new building on

> top of . . . we need to be sure that Tom Holmes installs grounding material that will tie the building into the tower ground, and the other buildings at the time the building is placed on the pad. The grading should be done so water and snow does not come inside the door. I think that you need to have a stern talk with Ken and Dennis. It is time for them to stay away from KBMX, and let the manager manage. . . . If this does not happen, and you get more reports of incidents, we will have to change the locks and keep them out of the station. . . . One way we can keep morale up is to keep purchasing new equipment such as remote gear, promotional items, vans, etc., so that we give an image of progress, not a dead-end station. . . . You need to make sure that Mary and Selina do almost all of the bookkeeping and office work, so that you can be free to do what you do best, managing the corporation.

I.D., ¶135; Bureau Exh. 9. Cox testified that she did not regard Rice's letter as a direction to her to do the things mentioned, but thought of it as a letter written by someone in prison "whose whole life is the radio . . . and . . . with nothing to do but idle time." Tr. 311, 313-314.

32. The ALJ concluded that the Licensees both misrepresented facts and lacked candor in their reports to the Commission. First, the ALJ found that the Licensees never directly disclosed Rice's consultative activities, but, in fact, represented in their May 14, 1992 pleading that "[t]here has been no change in Mr. Rice's status." In this regard, the ALJ rejected as lacking in candor Cox's testimony that the deletion of the word "consultative" from this and subsequent pleadings was intended to inform the Commission of Rice's

new role. In addition, the ALJ found that Rice was involved in at least some of the programming matters and personnel decisions of the Licensees, that he engaged in determinations as to whether or not to sell or trade a station or construction permit, and that he directed the group program director and two of the general managers of the Licensees' stations to perform certain tasks. The Licensees did not inform the Commission of these activities, the ALJ found, but misrepresented in their September 30, 1994 letter that Rice had been "excluded from involvement" in the management and operation of the stations and construction permits since April 1991. The ALJ specifically found that Rice was involved in programming matters at WFMZ, WZZQ, and KBMX(FM), directed hanks and Rhea in personnel decisions involving the firing of certain employees at their stations, and assigned projects to Leatherman at his station. In reaching these conclusions, the ALJ credited the testimony of Hanks and Rhea over that of Cox, Hauschild, Brown, and Leatherman. The ALJ rejected the Licensees' claim that Hanks and Rhea were "disgruntled" employees out to "get" them, and that their testimony was therefore not credible. The ALJ further found that the documentary evidence supported the testimony of Hanks and Rhea. In addition, the ALJ found that Cox had actual knowledge of Rice's consultative activities as well as his involvement in at least some programming and personnel matters and management-level activities. Moreover, the ALJ stated, Rice himself knew of his participation in the Licensees' affairs, but made no attempt to disclose it, even though he was the stations' sole owner. The ALJ concluded that the Licensees were motivated to deceive the Commission because they wanted to forestall a Commission inquiry into the criminal allegations against Rice and their impact on the Licensees' character qualifications. Had the Licensees disclosed Rice's specific consultative and management activities, the ALJ held, the Commission would have known that he was not "completely insulated and excluded," or that he had no role

in station affairs, as the Licensees had reported on numerous occasions.

33. In their exceptions, the Licensees deny that they inadequately reported Rice's activities to the Commission or that their reports contained false information. with respect to Rice's consultative work, the Licensees argue that their Section 1.65 reports were made in good faith and that Rice's activities were not so significant as to render the reports untruthful since there was no meaningful change in Rice's status. The Licensees also except to the conclusion that Rice was involved in some programming, personnel, and management-level activities after April 1991 and that the Licensees were aware of such involvement. They maintain that Rice did not partake in normal management functions after his release from the hospital, such as station budget and sales activities. Although Rice may have made unsolicited comments to Cox, Hanks and Rhea, the Licensees state, Cox made management decisions independent of what rice may have said. In this regard, the Licensees state there is no evidence that Hanks or Rhea communicated their purported conversations with Rice to Cox. The Licensees also contend that the ALJ improperly gave more weight to the testimony of Hanks and Rhea than to that of the other witnesses, even though both were disgruntled former employees and there was no reason to discredit the others. Specifically, the Licensees state that Hanks filed a discrimination suit against CMI and was heard by Hauschild to say he wanted to "get" the Licensees, and Rhea admitted to some animosity toward both Rice and Cox because of his termination. The Licensees also dispute the ALJ's reliance on corroborating evidence such as the fax messages Rice sent to Leatherman, and argue that these memoranda mainly reflect Rice's role as landlord. Likewise, the Licensees state that Rice's actions, as a shareholder, in rejecting preliminary inquiries about sale of a construction permit do not rise to the level of day-to-day policy or management of the stations. The Licensees also

contend that there is no evidence that Rice's alleged comments to Hanks and Rhea about personnel matters actually dictated the decisions that were made. Finally, the Licensees submit that there is no evidence of any intent to deceive the Commission because the Licensees modified their Section 1.65 reports to make them more accurate, and they had no knowledge of Rice's alleged directives to station employees.

Discussion

34. After careful review of the record, we conclude that the Licensees misrepresented and lacked candor in reporting to the Commission that, subsequent to his arrest, Rice was completely excluded from any further involvement in the management and operation of the Licensees' radio stations. The record reflects that, in their communications to the Commission, the Licensees did not merely fail to sate the full facts; instead, their representations were affirmatively misleading. We agree with the ALJ's detailed assessment of the hearing testimony, which is supported by his evaluation of witness credibility based upon his demeanor observations, and by corroborating documentary evidence. The preponderance of record evidence clearly supports a conclusion that the Licensees were not truthful. The duty of candor requires applicants to be fully forthcoming as to all facts and information that may be decisionally significant to their applications. See Swan Creek Communications v. FCC, 39 F.3d 1217, 1222 (D.C. Cir. 1994); RKO General, Inc. v. FCC, 670 F.2d 215, 229 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 and 457 U.S. 1119 (1982). Broadcasters are held to "high standards of punctilio" and must be "scrupulous in providing complete and meaningful information" to the Commission. See Lorain Journal Co. v. FCC, 351 F.2d 824, 830 (D.C. Cir. 1965). The requirement for absolute truth and candor from those appearing before the Commission is bedrock because the Commission must rely

heavily on the completeness and accuracy of the submissions made to it by applicants who, in turn, have an obligation to provide the Commission with the facts needed to carry out its statutory mandate. Intentional deceit with regard to matters of decisional significance may be disqualifying. See Swan Creek Communications v. FCC, 39 F.3d at 1222; RKO General, Inc. v. FCC, 670 F.2d at 232; Sea Island Broadcasting Corp. v. FCC, 627 F.2d 240, 243 (D.C. Cir.), cert. denied, 449 U.S. 834 (1980).

35. First, with regard to Rice's consultative activities after his release from the hospital, totally apart from his involvement in numerous programming and personnel matters at the stations discussed below, the Licensees were not fully forthcoming in disclosing Rice's consultative role to the Commission. Cox's testimonial claim that the Licensees informed the Commission of Rice's new role by removing the word "consultative" from their May 14, 1992 report is belied by the Licensees' contrary assertion in the same report that "there has been no change in Mr. Rice's status." Despite this obviously misleading characterization, the Licensees did not attempt to further clarify the matter in any future report to the Commission, or modify its corporate resolutions to formally authorize Rice's admitted consultative role. We agree with the ALJ that Cox's testimony that the Licensees were trying to be "as truthful as possible" (tr. 292) in this regard was itself lacking in candor since they never directly informed the Commission of Rice's consultative activities in any of their reports. We also reject the Licensees' exception that their May 1992 report was truthful because 47 C.F.R. §1.65 requires that only significant changes be disclosed. In view of the Licensees' previous reports that Rice would have absolutely no role or involvement in the affairs of the stations, we do not agree that a change resulting in Rice being involved in any manner in the operations of the stations could be considered so insignificant as not to reflect on the continuing accuracy and

completeness of the information furnished by the Licensees. Finally, in this regard, although the Licensees urge that Rice's consultative work at the stations was recommended by his psychiatrist for his rehabilitation, even if so, this fact has no bearing whatsoever on the impact of the Licensees' failure to be candid in disclosing these activities.

36. Turning to Rice's involvement in programming matters, there is testimony from two former management officials who were in knowledgeable positions detailing Rice's activities. Both believed that Rice, as the stations' sole owner, was their boss. Hanks, the group program director of the CMI/CBI stations from late 1991 or early 1992 to August 1994 reported directly to Rice about the stations' programming, visited WZZQ and reviewed its music at Rice's request, regularly discussed with Rice specific programming problems at WZZQ and WFMZ, as well as Rice's complaints about the stations' formats and song lists, and sent Rice memos that Hanks addressed to the stations' program directors. In addition, Rhea, the general manager of WZZQ and WBOW from December 1991 to December 1992, discussed WBOW's programming with Rice, and complied with Rice's specific request that he obtain information about the cost of the Satellite Music Network. Although Cox denied that Rice was involved in programming matters after 1991, and Brown and Hauschild said they had no communications from Rice regarding programming at their stations, they did not testify with respect to the specific instances recalled by Hanks and Rhea, and there is no evidence to contradict the latters' accounts. Indeed, Brown's tenure as general manager of the CMI stations post-dated the particular incidents described above. Moreover, there is also undisputed documentary evidence of Rice's involvement in programming at Lake's Eldon, Missouri station, KBMX(FM), in the form of a fax letter he sent to Leatherman, the station's general manager, asking to be told if the station needed more sound effects CDs. Rice

acted on the basis of information given him by Klautzer, a Lake shareholder and corporate officer, that such CDs were needed, and Leatherman complied with Rice's request by responding to Cox. Clearly, in this regard, if Rice were completely excluded form involvement in day-to-day station affairs, as the Licensees represented, there would have been no reason for a Lake corporate principal to inform him of a problem affecting daily operations of one of the stations or for the station's general manager to follow up on Rice's instructions. We conclude that the record amply supports the ALJ's finding that Rice was involved in programming activities at the Licensees' radio stations.

37. Hanks and Rhea also testified regarding Rice's involvement in numerous decisions to hire and fire station personnel. Specifically, Rice instructed Hanks to fire Pratt, Kinneson, Madden, and Davis; told Hanks that Jacobs, Steel, and Savage should be fired; and Hanks heard Rice tell Cox that Rhea should be fired, and Rhea was told by Cox that Rice wanted Steel fired. Rhea also testified that he was fired by Rice and Cox. Rice also approved Hanks' suggestion to move Jacobs to WZZQ as program director, and Hanks and Rhea both stated that Rice was involved in the hiring of Steel. Although Cox and Hauschild disputed the accounts given by Hanks and Rhea of these personnel actions and stated that Rice did not tell them he wanted the individuals in question hired or fired, both admitted that they were not privy to conversations Rice may have had with Hanks and Rhea about these employees and did not know what instructions he may have given the. Most of the employees about whom Rice gave directions to Hanks and Rhea in fact were let go. That Cox or Hauschild may have independently ordered the dismissal of some of these employees, or that some ultimately were not fired but resigned, does not undermine the significance of the evidence of Rice's involvement in these matters. In other words, Rice's involvement was inconsistent with the

Licensees' representations that he was excluded from the customary management and operation of the stations, regardless of whether other management officials also played a role in these decisions.

38. Insofar as there is a conflict in witness testimony regarding the extent or Rice's involvement in these personnel activities, however, we defer to the credibility findings of the ALJ who observed the witnesses and found Hanks and Rhea to be more believable. An ALJ's credibility finds are "entitled to great weight," Broadcast Assoc. of Colorado, 104 FCC 2d 16, 19 (1986), and his credibility determinations will be upheld unless the findings patently conflict with other record evidence. Milton Broadcasting Co., 34 FCC 2d 1036, 1045 (1972); KQED, Inc., 3 FCC Rcd 2821, 2823 (Rev. Bd. 1988), rev. denied, 5 FCC Rcd 1784 (1990), recon. denied, 6 FCC Rcd 625 (1991), aff'd mem. sub nom. California Public Broadcasting Forum v. FCC, 947 F.2d 505 (D.C. Cir. 1991); see also WHW Enterprises, Inc. v. FCC, 753 F.2d 1132, 1141 (D.C. Cir. 1985) (ALJ's credibility findings may not be upset unless reversal is supported by substantial evidence). In this regard, we disagree with the Licensees that Hanks and Rhea exhibited bias against them and, therefore, should not have been credited. Hanks brought a discrimination suit against the Licensees because he believed his termination was based solely on his health problem, epilepsy. Tr. 364. Hanks adamantly denied Hauschild's assertion that he made an off-the-record comment at a deposition in the suit that he wanted to "get" Rice and the Licensees, and the ALJ, after carefully evaluating Hanks' demeanor, found he was being truthful. I.D., ¶ 84 n. 8. Although the Licensees contend that the ALJ misinterpreted Hanks' demeanor, the law accords deference to the ALJ's witness observations. See Maria M. Ochoa, 8 FCC Rcd 3135 (1993), recon. denied, 9 FCC Rcd 56, recon. dismissed, 10 FCC Rcd 142 (1995), aff'd by judgment, 98 F.3d 646 (D.C. Cir. 1996) (Table) (affirming ALJ credibility

conclusion that witnesses were not biased or seeking to "get back" at applicant). Similarly, the Licensees argue that Hanks admitted to a tendency to exaggerate, but a careful review of his testimony reveals that he admitted exaggerating only when he said that Rice "never" changed his mind once it was made up, and clarified his testimony to say that Rice "occasionally" changed his mind and that he did not exaggerate in any of his other statements. I.D., at ¶ 102. Rhea admitted to some animosity toward Cox "at the time" he was fired because he viewed his termination as a career setback, but, as the ALJ found, there was no evidence that he continued to harbor such feelings when he testified three and a half years later. With regard to his alleged animosity to Rice, Rhea stated only that he was told he was fired because WBOW's numbers were not what they should be, that he felt the negative publicity surrounding Rice's situation contributed to the numbers going down, and that, therefore, "if [he] wanted to blame someone," he would blame Rice "a little bit." Tr. 521-22. We agree with the ALJ that Rhea's hypothetical response does not establish bias. I.D. at ¶ 188. Finally, in weighing witness credibility, we also agree with the ALJ that Cox, Hauschild, and Brown have "more to lose" from an adverse resolution of this proceeding because they are currently employed by the Licensees, whereas Hanks, Rhea, and Leatherman have no pecuniary interest in the outcome. Id. at ¶¶ 183-85. See The Prattville Broadcasting Co., 5 F.C.C. 2d 601, 602 (1966) (interest of witnesses in proceeding is relevant to credibility).[6]

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[6] Although the Licensees point to Cox's testimony that she has other sources of income and could maintain her current lifestyle, the ALJ found that she receives a salary of approximately $60,000 from the Licensees, has numerous perquisites including cost of living adjustments, bonuses, health insurance, and use of a car, that both her son and daughter are employed in managerial positions at the stations, and that (Continued...)

39. The testimony of Hanks and Rhea that Rice's involvement in the operation of the stations extended to more than just consultative work is also supported by contemporaneous documentary evidence in the record. See American International Development, Inc., 86 FCC 2d 808, 815 (1981) (existence of corroborative evidence is factor to be considered in weighing the truth of witness testimony); TeleSTAR, Inc., 2 FCC Rcd 5, 13 (Rev. Bd. 1987) (subsequent history omitted) (credibility involves the manner in which testimony "hangs together with other evidence"). Specifically, Rice sent six fax messages to Leatherman in 1993 directing him to take certain actions at KBMX. Although the Licensees contend that all but one of these memoranda related to Rice's role as landlord, the pattern is the same as that with respect to the other activities of Rice giving instructions to management officials which are then carried out. Similarly, Rice instructed Cox to take certain actions regarding personnel and other station matters in a 1995 letter. And perhaps most corroborative of Rice's involvement in station management are the three letters he wrote in 1993 and 1994 to officials of two radio stations in Moberly, Missouri, rejecting offers to purchase one of the Licensees' construction permits, inviting an offer to purchase a station once it is on the air, and suggesting an exchange of existing stations. In his letter to Dale Palmer of KZZT, Rice stated that he was following up on Palmer's calls to Cox,

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(...Continued)

her husband does business with the Licensees. I.D. ¶ 184. Thus, the ALJ reasonably concluded that she and her family would be seriously impacted by an adverse result. The Licensees also state that Leatherman is no longer employed by the, but the ALJ made this finding, as noted in the text. In any event, as to Rice's involvement in specific personnel matters, Leatherman's testimony does not directly conflict with that of Hanks and Rhea because they testified to Rice's activities at the Terre Haute and Columbia stations, whereas he was employed at the Eldon station.

which clearly implies that Cox apprised Rice of Palmer's purchase offer even though the Licensees had informed the Commission that Rice was "being completely insulated and excluded" from management activities. In this regard, we reject completely the Licensees' argument that the letters are unimportant because they do not relate to day-to-day station management; as the ALJ concluded, the decision as to whether or not to sell a broadcast property "is the ultimate management-level decision." I.D., ¶ 178.

40. Finally, we reject the Licensees' contention that there is no evidence of any intent to deceive the Commission because they lacked knowledge of Rice's involvement in station affairs and updated their Section 1.65 reports to insure their accuracy. In fact, the Licensees' reports, in addition to failing specifically to inform the Commission of Rice's consultative role, also did not tell the Commission of Rice's other activities of which the Licensees were aware. Specifically, with regard to Cox's knowledge of Rice's activities, the record shows that: Rice followed up on Palmer's phone calls to Cox when he responded to Palmer's interest in purchasing one of the construction permits; Rice informed Cox that he wanted Rhea fired, and Cox told Rhea that he was being fired because of Rice's displeasure over the station's financial figures; Cox told Rhea that Rice wanted Steel fired after Steel changed WZZQ's reporting status in a trade publication; after Rice asked Rhea for information about the cost of the Satellite Music Network, Cox told Rhea that Rice thought WBOW could be programmed for less money by bringing in Rice's own music; and Leatherman responded to Cox after Rice asked him about the need for sound effect CDs. Other station officials also knew of Rice's activities. Thus, Leatherman knew of the six faxes Rice sent him pertaining to various assignments at KBMX; Klautzer communicated to Rice the need for sound effects CDs at one of the stations; and Hanks and Rhea knew of Rice's specific involvement in

programming and personnel matters at their stations. In short, although numerous high-level management officials were aware of Rice's activities, the Licensees never modified their reports to the Commission that Rice was "completely insulated and excluded" from involvement in management and operation of the stations and had "no managerial or policy role in the affairs" of the Licensees. We conclude that the Licensees, who were well aware of the Commission's character policies, intended to mislead the Commission in these reports because they wished either to avoid Commission inquiry into Rice's criminal activities or to minimize the impact of those activities on the Licensees' qualifications by representing that he was no longer involved in the affairs of the stations. See Leflore Broadcasting Co., Inc. v. FCC, 636 F.2d 454, 462 (D.C. Cir. 1980) (deceptive intent may be found where there is a false statement together with knowledge of its falsity); Black Television Workshop, 8 FCC Rcd 4192, 4198 n. 41 (1993), recon. denied, 8 FCC Rcd 8719 (1993), rev. denied, 9 FCC Rcd 4477 (1994), aff'd sub nom. Woodfork v. FCC, 70 F.3d 639 (D.C. Cir. 1995) (Table) ("Intent is a factual question that can be inferred if other evidence shows that a motive or logical desire to deceive exists, as is the case here.")

IV. SANCTION

41. We conclude that the appropriate sanction for the misconduct displayed on this record is revocation of the Licensees' existing authorizations and denial of its new station application. In agreement with the ALJ, we find that Rice's felony convictions and the Licensees' misrepresentation and lack of condor with respect to Rice's role at the radio stations subsequent to his arrest constitute separate and independent grounds for disqualification of the Licensees. The Commission has removed broadcast authorizations because of serious misconduct, including violations of law, see South Carolina Radio Fellowship, and

misrepresentation or lack of candor, see Leflore Broadcasting Co., Inc. v. FCC, 636 F.2d at 461 ("Ever since the Supreme Court's decision in WOKO (footnote omitted), it has been clear that the Commission may refuse to renew a license where there has been willful and knowing misrepresentation or lack of candor in dealing with the Commission.") Moreover, the totality of the evidence in this proceeding of Rice'' criminal acts and the Licensees' deceit convinces us that the Licensees lack the requisite character qualifications to deal truthfully with the Commission and to comply with our rules and policies. See 1986 Character Policy Statement, 102 F.C.C. 2d at 1190-91; 1990 Character Policy Statement, 5 FCC Rcd at 3252; Star Stations of Indiana, Inc., 51 F.C.C. 2d 95 (1975), aff'd sub nom. Star Broadcasting, Inc. v. FCC, 527 F.2d 853 (D.C. Cir. 1975), cert. denied, 425 U.S. 992 (1976).

42. The Licensees claim in their exceptions that revocation of their authorizations would violate the Excessive Fines Clause of the Eighth Amendment.[7] Relying on Austin v. United States, 509 U.S. 602 (1993), which held that a civil forfeiture of property can be subject to the Eighth Amendment if it is imposed as a monetary punishment, the Licensees argue that license revocation would be unduly punitive in this case and an improper exercise of the Commission's discretion. We disagree that revocation here is constitutionally or otherwise inappropriate. Unlike a Commission license revocation proceeding, Austin involved an in rem forfeiture action against the mobile home and auto body shop of the petitioner under 21 U.S.C. §§ 881(a)(4) and (a)(7), which statues provide for the forfeiture of property used to facilitate drug-related crimes, 509 U.S. at 604. By contrast, 47 U.S.C. §312(a) provides for revocation of a

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[7] "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const., Amend. VIII.

station license or construction permit, inter alia, because of conditions which would warrant denial of a license or permit on an original application, or for willful or repeated violation of any provision of the Communications Act or Commission rule. In other words, the Commission's purpose is not to impose punishment, but it may revoke an authorization where, as here, it finds that the licensee or permittee has not met its statutory obligation to operate its facility in the public interest. See 47 U.S.C. §§307(a), 309(a). A licensed broadcaster is "granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." Office of Communications of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966). Thus, licensees do not own their authorizations but have only the temporary privilege of holding their licenses to operate their stations as public trustees, and a revocation proceeding such as this one does not involve forfeiture or seizure of the physical assets or facilities of the station. See also 47 U.S.C. §§ 301, 304, 309(h).

43. The Commission has broad discretion in its choice of remedies and sanctions. See RKO General, Inc. v. FCC, 670 F.2d at 237; Leflore Broadcasting Co. v. FCC, 636 F.2d at 463; Lorain Journal Co. v. FCC, 351 F.2d at 831. As previously explained, we believe the misconduct in this case was extremely serious, involving egregious criminal acts by the Licensees' sole owner and repeated misrepresentations by the Licensees designed to minimize the effect of Rice's criminal record on their qualifications. Cumulatively, the evidence of misconduct warrants a conclusion that the Licensees lack the requisite character traits of truthfulness and reliability to retain their authorizations. Unlike United Broadcasting Co., 100 F.C.C. 2d 1574, 1584 (1985), cited by the Licensees as support for a lesser sanction where there was significant evidence mitigating the impact of misconduct at two of the licensee's stations, including the institution of

pervasive remedial measures to prevent recurrence, the Licensees produced little evidence to mitigate the impact of Rice's misconduct, their remedial efforts to remove him from day-to-day management and policy activities at the stations were unsuccessful, and their representations in this regard were untruthful. That case also involved the deterrent impact of the Commission's previous denial of license renewal, which situation does not pertain here. See RKO General, Inc., 5 FCC Rcd 642, 644 (1990) (and cases cited therein) (deterrent impact of previous denial may provide basis for conclusion that recurrence of misconduct is unlikely). Moreover, unlike the cited cases, the misconduct here was not isolated or restricted to the operations of any particular station, but involved the criminal actions of the controlling owner of the Licensees and the Licensees' representations to the Commission on behalf of all their stations. We conclude that revocation is appropriate in the circumstances of this case.[8]

V. ORDERING CLAUSES

44. ACCORDINGLY, IT IS ORDERED, That the licenses of Contemporary Media, Inc. for Stations WBOW(AM), WZZQ(AM) (formerly WBFX(AM)), and WZZQ(FM), Terre Haute, Indiana, the authorizations of

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[8] In view of the seriousness of the misconduct and the Licensees' failure to undertake adequate remedial steps, we do not believe forfeiture is the more appropriate sanction. See PCS 2000, L.P., 12 FCC Rcd 1681, 1688-89 (1997) (forfeiture imposed for misrepresentation and lack of candor where applicant took measures expeditiously to remove wrongdoers from all positions of ownership and control). Insofar as the Licensees argue that revocation would adversely affect their station employees, we point out that our order permits the Licensees to keep operating pending the completion of appellate review. See RKO General, Inc., 89 F.C.C. 2d 361, 365 (1982) (Commission considers equity and fairness with respect to station employees in allowing continued operation by disqualified licensee pending appeal).

Contemporary Broadcasting, Inc. for Stations KBMX(FM), Eldon, Missouri, and KAAM-FM, Huntsville, Missouri, and the authorizations of Lake Broadcasting, Inc. for Stations KBMX(FM), Eldon, Missouri, and KFXE(FM), Cuba, Missouri, ARE REVOKED, and the application of Lake Broadcasting, Inc. (File No. BPH-921112MH) for a construction permit for a new FM Station on Channel 244A at Bourbon, Missouri, IS DENIED.

45. IT IS FURTHER ORDERED, That the Licensees ARE AUTHORIZED to continue operation of Stations WBOW(AM), WZZQ(AM), WZZQ(FM), KFMZ(FM), and KBMX(FM) until 12:01 A.M. on the ninety-first day following the release date of this Decision to enable the Licensees to conclude the stations' affairs; PROVIDED, however, that if the Licensees seek reconsideration or judicial review of our Decision, they are authorized to continue to operate Stations WBOW(AM), WZZQ(AM), WZZQ(FM), KFMZ(FM), and KBMX(FM) until 12:01 A.M. on the ninety-first day following the release date of any order on reconsideration or the completion of judicial review, whichever is later. Judicial review is completed when the forum which has jurisdiction to review this proceeding issues its mandate: Provided, however, that in a case when the mandate issues prior to the expiration of the period for seeking Supreme Court review and the permittee seeks Supreme Court review, judicial review will not be completed until the Supreme Court denies the petition for certiorari or issues a ruling on the merits affirming the denial of the applications, whichever occurs later.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX C

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	MM Docket No. 95-154
	)	
CONTEMPORARY MEDIA, INC.	)	
	)	
Licensee of Stations WBOW(AM), WBFX(AM), and WZZQ(FM), Terre Haute, Indiana	)	
	)	
Order to Show Cause Why the Licenses for Stations WBOW(AM), WBFX(AM), and WZZQ(FM), Terre Haute, Indiana, Should Not be Revoked	)	
	)	
CONTEMPORARY BROADCASTING, INC.	)	
	)	
Licensee of Station KFMZ(FM), Columbia, Missouri, and Permittee of Station KAAM-FM, Huntsville, Missouri (unbuilt))	)	
	)	
Order to Show Cause Why the Authorizations for Stations KFMZ(FM),	)	

Columbia, Missouri, and KAAM-FM, Huntsville, Missouri, Should Not be Revoked	)	
LAKE BROADCASTING, INC.	)	
Licensee of Station KBMX(FM), Eldon, Missouri, and Permittee of Station KFXE(FM), Cuba, Missouri	)	
Order to Show Cause Why the Authorizations for Stations KBMX(FM), Eldon, Missouri, and KFXE(FM), Cuba, Missouri, Should Not be Revoked	)	
LAKE BROADCASTING, INC.	)	File No. BPH-921112MH
For a Construction Permit for a New FM Station on Channel 244A at Bourbon, Missouri	)	

ORDER

Adopted: April 22, 1999 ; Released: April 28, 1999

By the Commission:

1. This Order denies a Petition for Reconsideration of a Commission Decision that affirmed an Initial Decision revoking the licenses and construction permits held by Contemporary Media, Inc., Contemporary Broadcasting, Inc., and Lake Broadcasting, Inc. (collectively, "Licensees"), and denying the Licensees' application for a new station. The Commission agreed with the ALJ that the Licensees should be disqualified because of violations of law relating to repeated sexual abuse of children by the stations' sole owner and misrepresentations by the Licensees. Contemporary Media, Inc., 13 FCC Rcd 14437 (1998).

2. Michael Rice, who is the Licensees' sole shareholder, the corporate president and treasurer, and director, was convicted in 1994 of twelve felonies, including eight counts of deviate sexual abuse and four counts of sodomy. These crimes involved five children. As a consequence of his criminal acts, Rice is currently incarcerated serving a maximum prison term of eight years.

3. In our Decision, we addressed first the effect of Rice's convictions on the Licensees' basic qualifications. In response to the Licensees' argument that the Commission's governing character policy is arbitrary and capricious as applied in this case, we reviewed the Commission's policy on character qualifications in broadcast licensing, as set forth in Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179 (1986), recon. denied, 1 FCC Rcd 421 (1986), appeal dismissed sub nom. NABB v. FCC, No. 86-1179 (D.C. Cir. June 11, 1987) ("1986 Character Policy Statement"), modified, 5 FCC Rcd 3252 (1990) (subsequent history omitted)("1990 Character Policy Statement"). We concluded that our character policies are validly applied to the Licensees, and that Rice's convictions involving the repeated sexual abuse of children adversely affected their qualifications to remain Commission licensees.

We further found that the Licensees did not make any significant showing of mitigation under this issue. Contemporary Media, Inc., 13 FCC Rcd at 14439, 14441 ¶¶ 4-5, 9. In addition to our findings regarding the impact of Rice's criminal behavior, we concluded that the Licensees misrepresented and lacked candor in repeatedly reporting to the Commission that, subsequent to his arrest, Rice was completely excluded from any involvement in the management and operation of the Licensees' radio stations. We held that Rice's criminal acts and the Licensees' deceit constituted separate and independent grounds for disqualification of the Licensees, and that the Licensees lacked the requisite character qualifications to deal truthfully with the Commission and to comply with our rules and policies. Id. at 14454-59 ¶¶ 34-41.

4. In their Petition for Reconsideration, the Licensees renew their contention that the Commission's 1986 and 1990 Character Policy Statement are arbitrary, both in general and as specifically applied to the Licensees, because there is no nexus between Rice's sexual misconduct and the Licensees' broadcast activities or propensity for truthfulness and reliability. The Licensees also argue that the Commission has not explained how it weighs the mitigation factors it applies in assessing the impact of criminal behavior and that, in any case, the Licensees' showing of mitigation was sufficient to warrant a conclusion that they are qualified. In this regard, the Licensees submit a July 23, 1998 letter from Donald L. Wolff, who is described as "Rice's parole counsel," which states that Rice is scheduled to be released from prison no later than December 29, 1999, and perhaps as early as April 30,1999. The Licensees argue that this information indicates that the Commission overstated the seriousness of Rice's crimes because he will "serve less than six years." Petition at 10.

5. With regard to the misrepresentation finding, the Licensees contend that the Commission mischaracterized the Licensees' statements because they never claimed to remove Rice from all station activities but only management, policy, and day-to-day decisions. Insofar as Rice performed the activities attributed to him in the record, the Licensees aver, this conduct was not decision-making and, accordingly, the Licensees' reports were not inaccurate. Although these "distinctions are subtle" (Petition at 13), the Licensees argue that they are supported by the record. The Licensees submit that the evidence establishes only that Rice "made unsolicited comments" to various station officials (Petition at 17), and engaged in "shmoozing, musings, and intermeddling" (Petition at 19), but not decision-making activities. Finally, the Licensees argue, as they did in their exceptions, that revocation of their authorizations violates the Excessive Fines Clause of the Eighth Amendment, and they cite U.S. v. Bajakajian, 118 S. Ct. 2028 (1998), for the proposition that revocation is a grossly disproportionate penalty.

6. It is well established that the Commission does not grant reconsideration simply for the purpose of debating matters on which it has already deliberated and spoken. See WWIZ, Inc., 37 FCC 685 (1964), aff'd sub nom. Lorain Journal C. v. FCC, 351 F. 2d 824 (D.C. Cir. 1965), cert. denied, 383 U.S. 967 (1966). To be successful, a petition for reconsideration must rely on new facts, changed circumstances, or material errors or omissions in the underlying opinion. See Sandab Communications Limited Partnership II, FCC 98-131, released June 24, 1998, ¶ 70; Isis Broadcast Group, 8 FCC Rcd 24 (Rev. Bd. 1992), rev. denied, 8 FCC Rcd 7040 (1993). Here we agree with the Mass Media Bureau's position in its opposition that the Licensees' Petition does not meet this test but largely reiterates arguments that we previously considered and rejected. Illustrative of the Licensees' overall approach is

the fact that the four principal arguments and three sub-categories of arguments listed in its Table of Contents are in almost identical verbatim repetition of the same arguments listed in the Table of Contents of its original exceptions. That is an insufficient basis for reconsideration.

7. On the violations of law issue, with respect to the application of our character policies to the Licensees, we affirmed our view that where, as here, there is a record of felony convictions involving "egregious crimes against society" that demonstrates a "callous disregard for the welfare of fellow citizens," we need not find the specific link or nexus the Licensees demand. We explained that the violations themselves are so serious that we have legitimate reason for concern about the Licensees' propensity to conform to our rules and policies, and to be truthful with us. Contemporary Media, Inc., 13 FCC Rcd at 14442, 14446 ¶¶ 11, 16.

8. In addition, we carefully reviewed the mitigation evidence in the record and concluded, contrary to the Licensees' view, that all but one of the factors we traditionally consider weighed against the Licensees. We found that Rice's crimes were extremely serious, willful, repeated over an extended period of time, recent, and committed by the sole owner of the stations. Furthermore, the Licensees failed to take adequate remedial measures, as they claimed, by removing Rice from involvement in station management after the charges were brought against him and did not establish rehabilitation. The Licensees' good overall record of rule compliance alone did not overcome the cumulative adverse impact of all this other evidence. Id. at 14444-46 ¶¶ 14-15. Thus, we perceive no ambiguity in our policy or its application here because, whatever "weighing" or order of preference we might assign to these individual factors, as urged by the Licensees, the overwhelming

preponderance of record evidence in this case still would warrant a resolution adverse to the Licensees.

9. The only new information submitted by the Licensees with respect to mitigation is the Wolff letter. The letter states that Rice's "conditional release date" is December 29, 1999; that following completion of a 12-month Missouri Sexual Offender Program, he could be released earlier "based on good behavior"; and that Wolff "expect[s]" release will be no later than December 29. As this letter indicates, the actual date of Rice's release from confinement has not yet been determined by prison authorities and is far from certain. But even if his time served ultimately is "less than six years," instead of eight, we do not see how this in itself reduces the seriousness of the nature of Rice's crimes or their negative impact on the Licensees' qualifications. Id. at 14444-46 ¶ 15.[1]

10. With regard to our findings of misrepresentation and lack of candor, we disagree with the Licensees that the "subtle distinctions" they are drawing between evidence of decision-making and other station activities warrant reconsideration. First, these purported distinctions do not undermine our conclusion that the Licensees lacked candor because they never directly informed the Commission in their reports that Rice was involved in consultative activities at the stations, even though their initial reports represented to the Commission that he had "no consultative role in the

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[1] We also disagree with the Licensees that we incorrectly affirmed the ALJ's refusal to credit the four "character statements" submitted on Rice's behalf. These statements do not carry great weight for the intended purpose because they do not discuss Rice's character in light of his criminal activities, but only his business record and ability, and one even disavows familiarity with Rice's criminal prosecution. Id. at 14444-46 ¶ 15; Licensees Exh. 5. Hence the letters afford little or no evidence of Rice's good character or rehabilitation.

affairs" of the stations and a later report claimed that there was "no change in Mr. Rice's status," even after he had taken on such a role. The Licensees did not attempt to clarify this matter in any of their reports, even though their initial reports clearly purported to exclude Rice from more than just decision-making. Id. at 14454-55 ¶ 35.

11. Second, quite apart from the evidence of Rice's consultative activities, we also found extensive testimonial and documentary evidence that Rice was openly involved in the operation of the stations, contrary to the Licensees' representation to the Commission that, from the time Rice was formally charged with criminal behavior, he was "excluded from involvement" in "day-to-day decisions and operations." In spite of the Licensees' overt claim in their initial reports that Rice was being "completely insulated and excluded from any involvement in . . . day-to-day decisions involving any" of the stations, the record disclosed detailed evidence of his involvement in specific programming matters at the stations as well as numerous decisions to hire and fire station personnel. Id. at 14448-50, 14451 ¶¶ 21-24, 27. Notwithstanding the Licensees' characterization in their Petition, these were undoubtedly decision-making activities. Indeed programming and personnel are two areas traditionally associated with station control. See Bennett Gilbert Gaines, 8 FCC Rcd 1405 (Rev. Bd. 1993), rev. denied, 9 FCC Rcd 533 (1994).[2] Although other management officials may have had an independent role in these decisions, and Rice may have been excluded from other management decisions, as the Licensees' maintain, there is no question that Rice's involvement in the important

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[2] The Licensees did not except to the ALJ's conclusion that Rice did not abandon or relinquish ultimate control over the Licensees because "Rice was never totally isolated and excluded form the management, operations, and affairs of the Licensees' stations." Contemporary Media, Inc., 12 FCC Rcd 14254, 14305 ¶ 197 (ALJ 1997).

station affairs described in the record was inconsistent with the Licensees' report that he was completely excluded from the "customary" management and operation of the stations and had "no managerial or policy role in the affairs" of the Licensees. Rice's activities went well beyond the Licensees' current assertion that he was merely making "unsolicited comments" or "shmoozing."[3] In fact, he gave various instructions to station officials that were carried out, and employees he wanted fired were let go. Contemporary Media, Inc., 13 FCC Rcd at 14455-56, 14457-58 ¶¶ 36-37, 39. Moreover, the Licensees never amended their reports to disclose the extent of Rice's involvement at the stations.

12. We also reject the Licensees' strained contention (Petition at 18-19) that evidence of Rice's involvement in station management in the form of three letters he wrote to officials of two radio stations rejecting offers to purchase one of the Licensees' construction permits, inviting an offer to purchase a station once it is on the air, and suggesting an exchange of existing stations, is insignificant because it shows involvement in ownership, rather than management and operation. We find that this distinction is not persuasive. The only case support cited by the Licensees is the Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393, 395-96 (1995), which discusses the Commission's former ownership integration criterion. That comparative licensing policy, however, has no bearing on the issue here or the factual record of Rice's involvement in significant managerial decisions at the stations. We affirm our original conclusion that the decision to sell a broadcast property is a fundamental management-level activity. Id. at 14457-58

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[3] According to Rosten, The Joys of Yiddish 300 (1986), "shmooz means a friendly, gossipy, prolonged, heart-to-heart talk." This hardly describes Rice's persistent and extensive involvement in important day-to-day decisions and operations at the stations.

¶39. But even if we were to disregard this aspect of Rice's involvement, the other corroborative evidence cited in ¶39 supports our conclusions. Finally, contrary to the Licensees' contention (Petition at 19), it is clear from the record that a member of high-level management officials had personal knowledge of Rice's decision-making activities; yet the Licensees never disclosed these activities by correcting or clarifying the representations made in their report to the Commission. Id. at 14458-59 ¶ 40.

13. Finally, we continue to believe that the revocation ordered in this proceeding does not violate the Eight Amendment. U.S. v. Bajakajian, relied on by the Licensees, which involved a forfeiture of currency for violating a federal statute requiring the reporting of the transportation of more that $10,000 outside the country, appears to have little bearing on the Commission's revocation authority. The court held that a "punitive forfeiture" violates the Excessive Fines Clause if it is "grossly disproportional" to the gravity of the offense. Id. at 2036. Revocation, however, is intended to ensure that stations will be operated in the public interest and does not involve seizure of the Licensees' property. Moreover the Licensees' argument (Petition at 24) that Rice has already been punished for his crimes by the state of Missouri misses the point of the Commission's character inquiry, and their further contention that they did not engage in intentional deceit that would warrant revocation is not supported by the record. We reaffirm that revocation is appropriate in this case.

14. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed July 27, 1998 by Contemporary Media, Inc., Contemporary Broadcasting, Inc., and Lake Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

s/Magalie Roman Salas

Magalie Roman Salas
Secretary

APPENDIX D

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 99-1198

September Term, 2000

Contemporary Media, Inc., et al.,
Appellants

Filed On:
UNITED STATES
COURT OF APPEALS
FOR DISTRICT OF
COLUMBIA CIRCUIT
FILED SEP 14 2000
CLERK

v.

Federal Communications Commission,
Appellee

BEFORE: Silberman, Henderson and Garland, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing filed July 31, 2000, and of the supplement thereto, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 99-1198 **September Term, 2000**

Contemporary Media, Inc., et al.,
Appellants

v.

Federal Communications Commission
Appellee

Filed On:
UNITED STATES
COURT OF APPEALS
FOR DISTRICT OF
COLUMBIA CIRCUIT
FILED SEP. 14 2000
CLERK

BEFORE Edwards, Chief Judge; Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellants' petition for rehearing en banc, the supplement thereto, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: s/Robert A. Bonner
Robert A. Bonner
Deputy Clerk

APPENDIX F

WAYNE A. STILLINGS, M.D.
KARE & THERAPY, INC.

CERTIFIED IN PSYCHIATRY
AMERICAN BOARD OF PSYCHIATRY
AND NEUROLOGY

1034 SO. BRENTWOOD, SUITE 516
ST. LOUIS, MO 63117
(314) 721-8242

July 29, 1994

The Honorable Jack Edwards

RE: Michael Rice

Your Honor:

IDENTIFYING DATA:

Mr. Michael Rice, is a fifty-three year old single white male who has been under my care from March 28, 1991 through the present. I have seen Mr. Rice for approximately 230 treatment sessions.

INFORMATION SOURCES:

Michael Rice, the patient's parents, Shirley and Mall Rice, the preliminary hearing records from the Circuit Court of St. Charles County, Missouri from March 21, 1991, the

deposition of Timothy Fiorini taken September 9, 1991, the report of Dr. J. Rabun, M.D., written September 27, 1991, Serial MMPI Testing, the Fifteen Items Test, the records of Barnes Hospital, the records of Dr. Ann Duncan, Ph.D., and Dr. W. Hively, Ph.D.

HISTORY:

For a clinical psychiatric history and general psychiatric assessment please refer to my prior reports dated June 17, 1991 and July 22, 1991 addressed to the Honorable Fred Rush (attached).

PSYCHIATRIC DIAGNOSIS:

1. Bipolar Affective Disorder, Mixed 296.6 – in remission
2. Dysthymia 300.40 – in remission
3. Dissociative Disorder NOS 300.15 – in remission
4. Alcohol Abuse 305.00 – in remission

PSYCHIATRIC TREATMENT:

Mr. Rice has undergone extensive inpatient psychiatric treatment (six months) and extensive outpatient psychiatric treatment that has consisted of multiple psychotherapeutic approaches and the use of psychotropic medication. He has received covert desensitization, which is a technique to normalize deviant thoughts and behavior patterns, especially with regard to the issue of sexual deviancy, cognitive behavior therapy, relaxation training, alcohol rehabilitation treatment strategies, insight oriented psychotherapy and response prevention treatment. In addition, he has been treated with psychotropic medications. Currently he is taking Lithium 900mg per day and Prozac 40 mg per day.

RESPONSE TO TREATMENT:

When Mr. Rice was initially seen he clearly had a chronic, long-standing psychosis as diagnostically demonstrated on the Minnesota Multiphasic Personality Inventory, which is an objective psychiatric diagnostic test that is highly accurate and highly reliable. At that time he was suffering from two psychotic conditions, Bipolar Disorder and Dissociative Disorder. The overall MMPI profile underscores a chronic pattern of psychiatric maladjustment of long-standing duration. Based on history, testing and mental status examination Mr. Rice had the onset of a psychosis in his late teens or early twenties associated with Bipolar Disorder and Dissociative Disorder. This psychosis was chronically present and went untreated until March 1991. The Fifteen Items Test for malingering is negative, which means that Mr. Rice is not malingering any type of mental illness whatsoever. Mr. Rice has undergone extensive psychiatric evaluation and psychiatric treatment to which he has responded quite well. He has been fully compliant with all psychiatric treatment recommendations. He underwent an extensive double crossover treatment protocol on Lithium to ensure that his Bipolar Affective Disorder and Dissociative Disorder are treatable and would respond to the point that they would go into remission (not active disease processes). This was performed in the following manner: Mr. Rice was assessed and his symptoms, thoughts and behaviors in an untreated state were characterized fully. Then treatment with Lithium and Prozac was initiated. Full psychiatric assessment was done on the medications, which revealed the absence of symptoms of Bipolar Disorder and Dissociative Disorder. Once the disorders abated the Lithium and Prozac were withdrawn. Within one week the Bipolar Affective Disorder and Dissociative Disorder returned in full force with the same symptom profile as that prior to treatment. He was then crossed over for a second time (double crossover) back onto the Lithium and Prozac, and his symptoms of

these disorders once again disappeared totally. His Lithium and Prozac levels and compliance in taking the medications can be monitored and will be monitored if appropriate on a regular basis to ensure that Mr. Rice is taking his psychotropic medications, which he has been doing faithfully. The Dysthymia has fully abated as well with psychotherapy and psychotropic medications. Also he has been successfully rehabilitated with respect to the Alcohol Abuse. In addition to individual treatment he has attended AA and has been sober for several years. In summary, all of Mr. Rice's psychiatric disorders have been successfully and completely treated.

MENTAL STATE AT THE TIME OF THE OFFENSE:

During the period of time covered by the allegations, Mr. Rice was in the state of a chronic psychosis and was suffering from the four above-mentioned psychiatric disorders, which rendered him incapable of conforming his conduct and behavior to the requirements of the law. He was unable to distinguish right from wrong and Mens Rea was absent. Simply stated, individuals with Bipolar Disorder frequently engage in inappropriate, impulsive, uncontrollable sexual behavior. The Bipolar Disorder in association with the Dissociative Disorder and their attendant psychoses caused Mr. Rice to dissociate and perceive himself as an adolescent and not as an adult, and also caused him to act in accordance with an adolescent perception of responsibilities and not in the frame work of adult responsibilities. Therefore, Mr. Rice's sexual activities during his adult life in an untreated psychiatric state were perceived by him as normal and as occurring by mutual consent.

CASE ANALYSIS:

1. Mr. Rice does not suffer from pedophilia.

2. He has been successfully treated for:

a. Bipolar Affective Disorder, Mixed

b. Dysthymia

c. Dissociative Disorder NOS

d. Alcohol Abuse

All the above psychiatric disorders are in remission.

3. Mr. Rice's psychiatric disorders are genetic/bio-chemical disorders and therefore are quite amenable to treatment. Certainly these disorders are not a result of his own choice nor actions and are not controllable by Mr. Rice without the assistance of psychiatric treatment.

4. At the time of commission of the alleged offenses Mr. Rice was suffering from the aforementioned mental disorders and as a result he was unable to conform his conduct and behavior to the requirements of the law, was unable to perceive that he was doing wrong nor could he distinguish right from wrong and was incapable of Mens Rea.

5. All disorders have been successfully treated and will remain in remission indefinitely with continued psychiatric treatment.

6. Since Mr. Rice's disorders are in remission and will remain so he will not be a recidivist.

7. Mr. Rice has demonstrated genuine remorse for his actions and their effects on others with respect to the current legal proceedings throughout treatment.

8. Mr. Rice can continue to be a productive citizen in our society.

9. It is my recommendation that Mr. Rice have continued psychiatric treatment on a monthly basis for the rest of his life. If he does so, he will be able to conform his behavior to the requirements of the law. Supervised probation would be the most appropriate psychiatric course of action in conjunction with continued indefinite psychiatric treatment on a regular basis.

Very truly yours,

s/W. Stillings

Wayne A. Stillings, M.D.
Board Certified in Psychiatry by the
American Board of Psychiatry and Neurology
Assistant Professor of Clinical Psychiatry
Washington University School of Medicine

WAS/mf